The Central Law Journal.

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CURRENT EVENTS.

CRIMINAL LAW REFORM.—In a former number of this JOURNAL[1] we noticed an article in the New York *Nation* in which a correspondent advocates the formation of a "National Association for Criminal Law Reform," from which should proceed projects of reform of criminal law to be laid before congress and the legislatures of the several States. Upon three of the six points upon which it was urged that reform was necessary, we expressed our views as fully as the limited space at our command would permit, and deferred the consideration of the others to a more convenient season.

These deferred subjects are:

1. The definition of self-defense in cases of homicide.
2. The allowance of new trials, and writs of error or appeals.
3. The pardoning power, its restriction or regulation.

On the first of these points, it is manifest to every one who has observed the usual practice in criminal cases, that the plea of self-defense in cases of homicide is more generally abused than any other line of defense open to the accused, except that of "emotional insanity." Those expert in "single fight and mixed affray" seldom find much difficulty in leading an inexperienced antagonist into such a position of *quasi* aggression, as will probably justify a reasonable doubt as to self-defense, and then killing him. Especially is this the case in those sections of the country cursed with the prevalence of the habit of carrying concealed weapons. And in our judgment the enactment and relentless enforcement of the most stringent laws against that detestable practice would go further, than any other line of legislation, to remedy the evil in question. The plea of self-defense is, in proper cases, and in those only, very meritorious; but the practical difficulty always is, to draw the line between those cases and those in which the tender regard of the law for the sacred rights of personal security is abused for purposes of deliberate murder. The law as it stands, or more properly, perhaps, its application, is necessarily vague and indefinite. The old rule was that one must "retreat to the wall" before he can excusably kill his adversary. What is the wall?

When the retreat to the wall was first promulgated as the rule of self-defense, brawlers fought with swords and clubs, and the line of forbearance was distinct and appreciable. Now, it is indefinite as possible. How can a man retreat to the wall when he is "covered" by a six-shooter? He must get the "drop" on his antagonist or go under himself. The change in weapons has produced much confusion in the application of the law, but the principle remains that the assailed must abstain as long as he can with safety to himself from killing his assailant. That principle cannot be impaired in any government which professes to protect the lives of its citizens; the trouble is, and always has been, that the lenient caution of courts and mistaken sympathy of juries have allowed it to operate in far too many cases to which it was in no proper sense applicable.

The chief fault of the law in this connection is that it is too indefinite, and we think that some good might be effected by careful and well considered legislation designed to define and limit the plea of self-defense. And, among other things, we think that the plea should not be allowed in cases in which the homicide had been committed with a weapon that had been unlawfully carried concealed by the accused.

As for abuses of the pardoning power, we do not believe that they exist to such a degree in any of the States as to render any legislation on the subject necessary, or any agitation for such legislation judicious or expedient.

Whether miscarriages of justice occur from abuses of the rights of appeal, new trials, and of sueing out writs of error, and what may be the best and most appropriate remedies for such abuses, are questions which we will consider in a future number.

[1] 23 Central Law Journal, 290.

NOTES OF RECENT DECISIONS.

EASEMENT — WATER — AQUEDUCT — PRESCRIPTION—UNITY OF TITLE.—The Supreme Court of Maine recently decided a case[1] involving questions of interest relating to easements in flowing streams and in aqueducts, and rights by prescription, as connected therewith.

The facts were that, in 1836 Herrick acquired a lease for 999 years of a certain spring, and the right to conduct its waters through the lands of conterminous proprietors. He constructed an aqueduct a mile long, from which the neighbors drew water for domestic and farm purposes by branch pipes, each paying a water rent for the privilege. Three persons, however, paid no water rent, but contributed in proportion to keep the aqueduct in repair. One of these was the predecessor of the plaintiff, and the defendant had succeeded to the farm and domicile of another. After Herrick's death in 1864, his rights in the aqueduct were sold to the defendant and Patten, who died, and by his will left all his property to his wife and daughter. In 1879, they conveyed the farm to the plaintiff Dority, including in the deed "all the branch water pipes, etc." Afterwards they conveyed to defendant Dunning all their interest in the aqueduct property. Thereafter Dunning excluded Dority from all use of the water, and he brought suit claiming that his water right was an easement appurtenant to his estate, and had passed to him by the deed of Patten's widow and daughter.

Upon this the court held the law to be, that an easement of this character will not pass as an appurtenance to an estate conveyed, unless it has ripened into a legal right and become attached to the estate.[2] An easement of this description does not pass by virtue of the *habendum* clause of the deed, for that only limits and describes, but never extends the subject-matter of the grant.[3]

The court says, however: "But when an easement, although not originally belonging to an estate, has become appurtenant to it, either by express or implied grant, or by prescription which presupposes a grant, a conveyance of that estate will carry with it such easement, whether mentioned in the deed or not, though it may not be necessary to the enjoyment of the estate by the grantee."[4] And the court adds, that evidence showing an adverse and exclusive use of water for forty-five years will be considered presumptive evidence of a grant.[5] "And this is as true," says Parker, C. J.,[6] "in relation to water flowing through an aqueduct for use at a house, by the occupants, as it is in relation to the water of a river used for propelling machinery."

To this may be added the language of Chief Justice Mellen: "The law gives a natural construction to the conduct of the parties, and after a long succession of years presumes that the person enjoying the easement, having no right to enjoy it unless under the grant of the true owner, had such a grant; and that in consequence of it he had never been molested in his enjoyment."

Another point of interest is discussed and settled by the court in this case: That although by the sale of the aqueduct property to defendant and Patten there was a union of title in the latter of both the aqueduct and the easement in it of his own farm, which was subsequently conveyed to the plaintiff, the easement appurtenant to the farm did not merge in Patten's hand with the aqueduct property which he acquired from Herrick's administrator, and was extinguished by it. On this subject the court says:

"That an easement will become extinguished by unity of title and possession of the dominant and servient estates in the same person by the same right, is a principle of law too general and elementary to be questioned. But this principle, like many others, is subject to qualifications. In order that unity of title to the two estates should operate to extinguish an existing easement, the ownership of the two estates should be co-extensive, equal in validity, quality, and all other cir-

[1] Dority v. Dunning, 6 Atl. 6, Sept., 28, 1886.

[2] Spaulding v. Abbott, 55 N. H. 428; See also Brown v. Manter, 21 N. H. 533; Sumner v. Williams, 8 Mass. 74.

[3] Manning v. Smith, 6 Conn. 289.

[4] 2 Washb. Real Property, 28; Kent v. Waite, 10 Pick. 138.

[5] Watkins v. Peck, 13 N. H. 370; Wallace v. Fletcher, 30 N. H. 432; Ashley v. Ashley, 4 Gray, 200; White v. Chapin, 12 Allen, 519; Jewell v. Hussey, 70 Me. 437; Murchie v. Gates, 78 Me. 304; s. c., 4 Atl. Rep. 698.

[6] Watkins v. Peck, *supra*.

cumstances of right. If one is held in severalty, and the other only as to a fractional part thereof by the same person, there will be no extinguishment of such easement.[7] Thus it was held by Abinger, C. B., in the English court of exchequer, in Thomas v. Thomas,[8] in which case one estate was held in fee, and the other for a term of 500 years, that unity of possession did not extinguish the easement, but only suspended it during that unity of possession; and upon parting with the premises to different parties the right revived."

The court applying these principles holds that there could be no extinguishment of the easement by reason of the unity of title in Patten of the easement and the aqueduct itself, because his interest in the latter was fractional, and because, at best, it was a chattel interest, limited to 999 years. This latter reason, however, seems to have little force for the duration of the easement—at the utmost only extended to that precise period. The former reason, that Patten, owning the land owned also the easement, did not own the *whole* of the aqueduct, only half of it; and if the union of title of the easement and the aqueduct would operate to extinguish the former, it does not follow that utiny of title of the easement and *half* the aqueduct would have the same effect.[9]

SALE—WARRANTY—AUTHORITY OF AGENT—REPRESENTATIONS OF VENDOR IN PRICE-LIST.—The Supreme Court of New Hampshire decided last summer a case[10] that should be a warning to too enterprising firms and overzealous salesmen. The facts found by the court were as follows: The defendants, by their agent Chesley, sold to plaintiff a steam heating boiler, warranting it to be durable, meaning by that term, as understood by both parties, that, with due care, it would last twenty or thirty years. The uestion was whether the evidence showed that a warranty had been given by the defendant. The court held in effect, that if a vendor furnishes to his salesman a price-list or pamphlet containing a description and list of prices of his wares for distribution among his customers, and in that list durability is enumerated among the necessary qualities of a good boiler, by doing so he authorized his salesman to warrant the qualities so specified in the price-list as essential to a good boiler. The presumption is that he intends to sell a *good* article and not an inferior one. The court says: "The representations of the defendants, contained in their pamphlet and distributed by their authorized agent, are as binding upon them as though orally made by them to a purchaser, or included in a bill of sale."

The court held, further, that the presumption that the vendor was acting in good faith in distributing the pamphlet, might well be the basis of a further presumption of authority in his agent to warrant the goods to be all that in the pamphlet they were represented to be.

A PLEA FOR STRICT CONSTRUCTION.

It is part of the respect and loyalty due the constitution to interpret it faithfully and precisely according toits letter and spirit. We should love it as much for the restraints it imposes as for the powers it delegates.

"This government," says Chief Justice Marshall (4 Wheat. 405), is acknowledged by all to be one of enumerated powers." Just as the grant of an estate is at common law a limitation of the estate granted, so the enumeration of certain powers in the constitution is a limitation of such powers and a prohibition against transcending them. "The government being one of granted powers its authority was limited by them," says Justice Field, and this is the view adopted in numerous instances by the supreme court.

The tenth amendment is virtually a rule and warrant placed in the constitution itself for a strict construction:

"The powers not delegated to the United States by the constitution, nor prohibited by

[7] Ritger v. Parker, 8 Cush. 147; 2 Washb. Real Prop. *85.

[8] 2 Cromp., M. & R. 34.

[9] On this subject generally, see, *In re* Gay, 5 Mass. 419; Chapman v. Gray, 15 Mass. 445; Brewster v. Hill, 1 N. H. 350; Hollenback v. McDonald, 112 Mass. 249; McConnell v. American, etc. Co., 5 Atl. Rep. 785, and note; Cross v. Ketts, 10 Pac. Rep. 409.

[10] Smillie v. Hobbs, Gordon & Co., 2 New Eng. Rep. 345, July 29, 1886.

it to the States, are reserved to the States respectively or to the people."

The loose constructionist view has always lacked the directness and candor that comes from an entire dependence on the literal truth. It was obviously a loose constructionist who, as a member of a committee on revisal in the constitutional convention of 1787, sought to throw the "general welfare" clause of section 8, article III, into a separate paragraph, when the trick was discovered and frustrated, A similar object is attempted in another way, by substituting a semi-colon for the comma of the original in the same passage, making the reading as follows: "The congress shall have power to levy and collect taxes, duties, imports and excises; [,] to pay the debts and provide for the common defense and general welfare of the United States," etc.

The interpolation of a semi-colon after the word excises changes the sense materially, and seems to delegate power without any limit, except congressional discretion. This false punctuation was at one time common and is still found in some school books (Eq. Venable's United States History), and in some of the blue books issued by State legislatures.

There ought to be very little doubt as to the meaning of this passage in its correct version (that of the original MS. of the constitution preserved at Washington). The exposition of Thomas Jefferson during the Bank controversy (1791) was afterwards substantially adopted by the supreme court. It is quoted approvingly by Judge Story in his Commentaries on the Constitution.

That a vast amount of specious reasoning has been ventured by broad constructionists to show that the clause, "to pay the debts and provide for the common defense and general welfare," was a separate and substantive grant of power, and not, as Jefferson contended, a limitation by way of defining the purpose for which congress might "lay and collect taxes, duties, imports and excises."

The last of the enumerated powers delegated to congress has also been made a battle field of hermeneutics. It authorizes the legislative branch "to make all laws which shall be necessary and proper for carrying into effect the foregoing powers and all other powers vested by this constitution on government of the Uuited States or in any department or officer thereof."

We might well rest content with the interpretation Chief Justice Marshall places upon this clause (McCullough v. State of Maryland, 4 Wheat 421). The incidental and implied powers herein provided for must not only be necessary and proper, but they must be "appropriate" and "plainly adapted" to the powers previously enumerated, and they must "consist with the letter and spirit of the constitution."

Unfortunately, the words of the great jurist, himself a Federalist and (for his time) a broad constructionist, are become like the constitution itself, too narrow and literal for the centralizing constructionists of to-day.

Judge Story believes that this power, if it were not expressed, would be implied from the previously enumerated powers. "It neither enlarges any power specifically granted, nor is it a grant of any new power." (Story on the Constitution, sec. 603.)

Loose interpretation endanger the very value and existence of the constitution. If expediency, emergency, popular acclaim and majority absolutism are to strain, evade, and quibble over the limits of Federal sovereignty therein prescribed, the definitions of the compact have ceased to be binding. They have ceased to check the very tendencies for which they were designed.

A strict and literal observance of these provisions is the only sound and honest, as it is the only safe and desirable policy. Construed in a loose and vague manner, the question will ultimately be one of limit or no limit, one of a living, stable charter of freedom, or an obsolete and dead-letter constitution.

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VENDOR AND VENDEE—THE RULE IN REGARD TO FIXTURES.

Bouvier defines a fixture as a personal chattel affixed to real estate, which may be severed and removed by the party who has affixed it, or by his personal representatives, against the will of the owner of the freehold.[1] But, while the definition is perhaps sufficiently lucid to enable every one to form an intelligent idea of what constitutes a fixture, abstractly considered, it sheds but little light upon itself when we come to determine the question as to whether given appendages or annexations to houses or lands are to be considered as part of the realty, and, hence, partaking of its immovable character, or simply as personal property, which follows the person of the owner.

It is a rule of the common law, that whatever is accessory to real estate is a part of it, and passes by alienation. The necessities of trade have caused a modification of this rule, so far as it may affect the relation of landlord and tenant, and courts recognize and enforce the right of removal by tenants of chattels annexed to the freehold for the purposes of manufacture, agriculture, or domestic use and convenience. But between vendor and vendee the rule is still applicable, except so far as it may have been modified by statutory regulation, and where the question is not affected by the terms of the contract, appurtenances and chattles attached to the land or buildings, and contributing to their value and enjoyment, pass by the grant of the freehold, and after conveyance cannot be severed by the vendor or any person other than the owner.[2]

Just what shall be regarded as a fixture, sufficient to escape the operation of the foregoing rule, is not always an easy matter to decide. Many things pass by the deed of a house, being put there by the vendor, which a tenant who had put them there might have removed; and they will be regarded as permanent annexations which pass to the vendee, although attached for the purposes of trade, manufacture, or even for ornament or domestic use. Thus, utensils and machinery, appertaining to a building for manufacturing purposes;[3] gas pipes, fittings, and other apparatus, designed for purposes of illumination,[4] including even chandeliers, burners, etc., when it is apparent that such was the intention of the parties,[5] or they are clearly shown to be accessories and not merely furniture;[6] water pipes and conduits;[7] ranges, boilers, and tanks, attached in a permanent manner;[8] stoves, and hot-air furnaces or other appliances for heating, when put in as a permanent annexation,[9] though upon this point the authorities are not agreed;[10] window and door screens,[11] storm doors, or other adjuncts made and fitted to the house,[12] though if never actually used and the house is complete without them they might not pass, even if on the premises;[13] and, generally, anything the vendor has annexed to a building, for the more convenient use and improvement of the premises, passes by his deed, unless specially reserved. The rule, therefore, would seem to be, that where the annexation is permanent in its character, and essential to the purpose for which the property is used or occupied, it should be regarded as realty, and pass with the grant of the freehold, and this, notwithstanding the connection between them, may

[1] Bou. Law Dict., 593.

[2] Tourtellot v. Phelps, 4 Gray (Mass.) 378; Kennard v. Brough, 64 Ind. 23; Lapham v. Norton, 71 Me. 83; Westgate v. Wixon, 128 Mass. 304; Alvord Manf. Co. v. Gleason, 36 Conn. 86; VanKuren v. R. R. Co. 38 N. . L. 165.

[3] As potash kettles in an ash factory, Miller v. Plumb, 6 Cow. (N. Y.) 665; a cotton gin permanently fixed, Bratton v. Clawson, 2 Strob. (S. C.) 478; a steam engine to drive a bark mill, Oves v. Oglesby, 7 Watts (Pa.), 106; kettles set in brick in a print works, Dispatch Line v. Bellamy Mfg. Co., 12 (N. H.) 207; iron stoves fixed to the brick work of chimneys, Goddard v. Chase, 7 Mass. 452; fixed tables in a mill, Sands v. Pfeiffer, 10 Cal. 257; blower and pipe conveying air to a forge, Alvord Mfg. Co. v. Gleason, 36 Conn. 86; a factory bell, *Ibid;* and Weston v. Weston, 102 Mass. 514.

[4] McKeag v. Ins. Co., 81 N. Y. 38; Hays v. Doane, 11 N. J. Eq. 96.

[5] Pratt v. Whittier, 58 Cal. 126; Keller v. Keller, 31 N. J. Eq. 191; and see Johnson v. Wiseman, 4 Met. (Ky.) 357; Smith v. Commonwealth, 14 Bush. (Ky.) 31.

[6] Keller v. Keller, 31 N. J. Eq. 191.

[7] Philbrick v. Emry, 97 Mass. 134.

[8] Pratt v. Whittier, 58 Cal. 126.

[9] Goddard v. Chase, 7 Mass. 432; Blethen v. Towle, 19 Me. 252; Stockwell v. Campbell, 39 Conn. 362.

[10] See Towne v. Fisk, 127 Mass. 125.

[11] Petengill v. Evans, 5 N. H. 54; Pratt v. Whittier, 58 Cal. 126.

[12] Petengill v. Evans, 5 N. H. 54.

[13] Peck v. Batchelder, 40 Vt. 233.

be such that it may be severed without physical or lasting injury to either.[14]

The mode of annexation, while of controlling efficacy, as between landlord and tenant, and, possibly, between executor and heir, is of comparatively small moment, as between vendor and vendee, the purposes of the annexation and the intent with which it was made being, in most cases, the important consideration.[15]

It is true the mode of annexation, in the absence of other proof of intent, may become controlling, as where it is in itself so inseparable and permanent as to render the article necessarily a part of the realty;[16] and even in case of a less thorough method the manner of attachment may still afford convincing evidence that the intention was to make the article a permanent accession.[17] Still, there is no universal test, and neither the mode of annexation or the manner of use can ever be said to be entirely conclusive, the express or implied understanding of the parties being usually the pivot on which the question turns.[18]

The greatest difficulty in the application of the rules for determining fixtures occurs in the case of what may, under ordinary circumstances, be fairly classed as furniture; contrivances for heating and illumination. Lamps, chandliers, and gas fixtures, generally, are usually regarded as furniture. True, they are often sold with the house, which can hardly be said to be complete without them, but unless there has been a special agreement in regard to them they will not pass under the general clauses of the deed.[19] Mirrors are ordinarily regarded only as furniture, nor will the fact that they are fastened to the walls for safety or convenience deprive them of their character as personal chattels and make them part of the realty;[20] but if they are set in the walls, with frames corresponding to the cabinet work, and their removal would leave the walls in an unfinished condition, the rule is otherwise.[21] Portable hot-air furnaces have been held to come within the same rule,[22] and would, doubtless, be governed by the same principles, but in this, as in every case involving the questions just discussed, the intention of permanent annexation must decide the matter, and where it appears that either gas fixtures[23] or furnaces[24] were considered as integral parts of the realty, and as such were to pass with the buildings, effect will be given to such intention, notwithstanding no mention has been made in the deed; and, generally, in all cases of doubt the rule for determining what is a fixture should be construed most strongly against the vendor.[25]

It will, of course, be understood, that parties themselves may, by express agreement, fix upon chattels annexed to realty whatever

[14] Green v. Phillips, 26 Gratt. (Va.) 752; Smith v. Commonwealth, 14 Bush. (Ky.) 31; Parsons v. Copeland, 38 Me. 537; Keeler v. Keeler, 31 N. J. Eq. 191; Bishop v. Bishop, 11 N. Y. 123; Pea v. Pea, 35 Ind. 387; Philipson v. Mullanphy, 1 Mo. 620; Cohen v. Kyler, 27 Mo. 122.

[15] McRea v. Bank, 66. N. Y. 489; Wheeler v. Bedell, 40 Mich. 693; Richardson v. Borden, 42 Miss. 71; Eaves v. Estes, 10 Kan. 314.

[16] Lyle v. Palmer, 42 Mich. 314.

[17] As, for instance, where the building is constructed expressly to receive the debatable articles, machinery, utensils, etc., and they could not be removed without material injury to the building; or, where the article would be of no value, except for use in that particular building, or could not be removed therefrom without being destroyed, or greatly damaged. McRea v. Bank, 66 N. Y. 489. A rule for determining whether or not a chattel is so annexed to the realty as to become a part of it is laid down by Bartly, J., in Teaff v. Hewitt, 1 Ohio St. 511, as follows: "From the examination I have been enabled to give this subject, and a careful review of the authorities, I have reached the conclusion that the united application of the following requisites will be found the safest criterion of a fixture: 1, actual annexation to the realty, or something appurtenant thereto; 2, appropriation to the use or purpose of that part of the realty with which it is connected; 3, the intention of the party making the annexation to make the article a permanent accession to the freehold, this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose or use for which the annexation was made. This criterion furnishes a test of general and uniform application—one by which the essential qualities of a fixture can, in most instances, be certainly and easily ascertained, and tends to harmonize the apparent conflict in the authorities relating to the subject. It may be found inconsistent with the reasoning and distinctions in many of the cases, but it is believed to be at variance with the conclusion in but few of the well considered adjudications."

[18] Wheeler v. Bedell, 40 Mich. 693; Funk v. Brigaldi, 4 Daly (N. Y.), 359.

[19] Vaughen v. Haldeman, 33 Pa. St. 522; Rogers v. Crow, 40 Mo. 91; McKeage v. Ins. Co. 81 N. Y. 8; Jarechi v. Philharmonic Soc., 79 Pa. St. 403.

[20] McKege v. Ins. Co., 81 N. Y. 91.

[21] Ward v. Kilpatrick, 85 N. Y. 413.

[22] Towne v. Fiske, 127 Mass. 125.

[23] Pratt v. Whittier, 58 Cal. 126.

[24] Stockwell v. Campbell, 39 Conn. 362; Thielman v. Carr, 75 Ill. 385.

[25] Pratt v. Whittier, 58 Cal. 385.

character they may see fit.[26] Hence, property which the law regards as fixtures may be by them considered as personal chattels, and that which in contemplation of law is regarded as personalty they may regard as a fixture and part of the realty, and whatever may be their agreement courts will enforce it.[27]

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[26] Pratt v. Whittier, 58 Cal. 126; Bartholomew v. Hamilton, 105 Mass. 239.
[27] Smith v. Wagoner, 50 Wis. 155.

DRAM-SHOP LICENSES—VALIDITY ON QUO WARRANTO.

In most of the States, as in Missouri,[1] the statutes prohibit the maintenance of a dram-shop without a license from the State through its proper officer, and require certain things to be done before the officer shall issue the license (for example, requiring the presentation of a petition signed by a majority of property owners in the locality). These are jurisdictional facts, and although the officer may in addition be given a discretion which the court will not be at liberty to review,[2] yet, in respect of the jurisdictional facts, these are essential to the power of the officer to issue the license,[3] and will be open to examination by the courts, and the license will not preclude that inquiry.[4]

But whether rightly or not, it is usually held that, in prosecutions for maintaining a dram-shop, the State will not be permitted, upon introduction of the license in defense, to show that it was issued without a compliance with and in violation of the statute, and the law is thus successfully evaded.

It is the purpose of this article to show that such license is a franchise; that an information in the nature of *quo warranto* is the proper remedy to test its validity, and if illegally issued the usurpation will result in a judgment of ouster and a fine.

An information in the nature of *quo warranto* permits inquiry into the very right to the franchise exercised and is not stopped by mere paper title.[5] This is elementary.

Unlike the ancient writ of *quo warranto*, now obsolete, the information in the nature of *quo warranto* is in form a criminal proceeding for the common law misdemeanor of usurping any office or franchise derivable from the State,[6] and is not confined to such franchises as pertain to the royal prerogative.[7] Upon conviction, a judgment of ouster is entered and a fine imposed upon the defendant.

Is a dram-shopkeeper's license a franchise?

Franchises are mentioned by Blackstone[8] as the seventh sort of incoporeal hereditaments. He says they are various—almost infinite—and enumerates: markets, fairs, chases, parks,[9] warrens, ferries,[10] etc. In the great *quo warranto* case against the city of London in the reign of James II, Pollaxfen, the leading counsel for the city, said: "I agree that franchise is a large word, it is of like sense of liberty or privilege. Therefore, in *quo warranto*, franchises, liberties and privileges seem to be of the same sense.[11]

"Franchises," said Chief Justice Taney, "are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country generally of common right. It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from the law of the State."[12] It matters not whether privilege was one which could have been exercised at common law. The question arose in People v. Utica,[13] where

[1] 2 R. S. Mo. ch. 98.
[2] High Extra. § Leg. Rem., § 42, 46.
[3] State & Hudson 13 Mo. App. 61.
[4] Jolley & Faltz 34 Cal. 326; Clark & Holmes 1 Doug. (Mich.) 393. These apply with greater force to ministerial officers.
[5] State *ex rel.* v. Jones, 16 Flor. 305; State *ex rel.* v. Woodbury, 14 Cal. 43; State *ex rel.* v. Vail, 53 Mo. 97. 107; State *ex rel.* v. Coffee, 59 Mo. 59.
[6] King v. Stanton Cro Jac. 259; Comyn's Dig. tit. *quo warranto* a and e; Darley v. Regina, 12 Cl. & F., p. 532; King v. Nickolson, 1 Stra. 303; State *ex rel.* v. Mechan, 45 N. J. L. 194; People v. Utica Co., 15 Johns. 358; People v. Ridgley, 21 Ills. 69; Tanc. *quo warranto*, p 5; State *ex rel.* v. Jones, 16 Flor, 306. As to form of information see Tom. Law Dic. tit. *quo war.*
[7] People v. Utica Co., 15 John. 358; People v. Ridgley 21 Ills. 69; State *ex rel.* v. Jones 16 Flor. 306.
[8] 2 Blk. Com. 37.
[9] Applied in Mayor v. Park Com., 44 Mich. 602.
[10] Chilvers v. People, 11 Mich. 43.
[11] 8 How. Sta. Tr., p. 1243.
[12] Bank of Augusta v. Earle, 13 Pet. 595; Cooley Taxation, 406-7; Home Ins. Co. v. Augusta, 50 Ga. 537.
[13] 15 John. 358; same ruling on injunction proceedings, where Chancellor Kent held that remedy was by

an information in *quo warranto* was tried for usurping the franchise of banking, the laws of New York having restrained unincorporated associations from engaging therein. But the court observed: "Formerly the right of banking was a common law right belonging to individuals, and to be exercised at their pleasure. It cannot, however, admit of doubt that the legislature had authority to regulate, modify or restrain this right. This was done by the restraining act of 1804. * * * The right of banking by any company or association has, since the restraining act, become a franchise or privilege derived from the grant of the legislature, and subsisting only in such companies or association as can show such grant." So it is held that a pilot's license is a franchise, for the usurpation of which the information will lie.[14]

We, therefore, think it clear that one who assumes to maintain a dram-shop assumes to exercise a right, privilege and liberty which other citizens, by express provision of statute, are denied the right of exercising without special permission of the State. That such special right, which can only be exercised under express grant, is as much a franchise as the business of banking under the New York law, the privileges of pilot, or right to maintain a market, ferry, warren, or park for deer (incidents of the "Forest Laws") at common law.[15]

The attorney-general has undoubted common law authority to exhibit the information, *ex officio*, without leave of court first had, and in most of the States the supreme court is given original jurisdiction.[16]

From the language employed by Mr. High at one place in his work on Extraordinary Legal Remedies, it would seem that the operation of the modern information in *quo warranto* was confined to usurpations, misuser or non-user of a public office or corporate franchise;[17] but the succeeding pages show that the observation was limited to proceedings instituted under the statute of 9 Anne, ch. 20. The authorities are numerous and uniform, that corporate franchises are not the only ones cognizable on such informations.[18] For a proper appreciation of the authorities on informations in *quo warranto*, it must be borne in mind that the proceeding was not of statutory but common law origin, and was founded upon the alleged misdemeanor of usurping a privilege which could not be exercised without authority of the crown or parliament.[19] The clerk or master of the crown office, like the attorney-general, had the right to file such information, *ex officio*, upon the suggestion of private persons, but having abused that discretion by the procurement of "malicious and contentious persons," the statute of 4 and 5 W. & M., ch. 18, prohibited him from exhibiting informations of any kind, without leave of court, and required the prosecutor in all instances to enter into a recognizance for costs. The attorney-general's power remained untouched. In the exercise of the discretion then lodged with the court, the rule was adopted that the application for leave would be denied where no public interest was involved;[20] but where the usurpation worked injury to private right, it became a proper cases for the exercise of discretion, and leave would be granted.[21]

The statute of 9 Anne, which has been reenacted in the various States, was designed, says the preamble, to render more speedy and effectual the remedies by writs of *mandamus* and informations in *quo warranto*, for the more easy trying and determining the rights of offices and franchises in corporations and boroughs. It provided that informations in such cases might be exhibited by leave of court by the court's officer (not the attorney-general who possessed the power, *ex officio*), at the relation of the person desiring to prosecute the same, and who should be mentioned as relator.[22]

information in *quo warranto*. Atty-Gen. v. Utica Co., 2 Johns. Ch. 371.

[14] State *ex rel.* v. Jones, 16 Flor. 306; State *ex rel.* v. Woodbury, 14 Cal. 43.

[15] Austin v. State, 10 Mo. 592; State v. Hudson, 78 Mo. 304.

[16] Tancred *Quo War.*, 13-15; State v. Ins. Co., 8 Mo. 331. Under statutory provision in most of the States the circuits' attorney may exercise the like authority: State *ex rel.* v. Lawrence, 38 Mo. 538; State v. Bernondy, 36 Mo. 279.

[17] High Extra. Leg. Rem., § 591.

[18] See citations in notes 5, 6, 7 and 8.

[19] Tanc. Quo War., 5; Cole Crim. Inf., 112, see also p. 2.

[20] Cole Crim. Inf., 117-119; Tanc. Quo War., 8-10, 13.

[21] Rex v. Mayor of Hartford, 1 Ld. Ray. 426; also reported in 1 Salk. 374; 12 Mad. 225; Buller's Nisi Prius, 208; Tanc. Quo War., 22-50.

[22] Cole Crim. Inf., 127.

A clear and distinct remedy was thus afforded private persons for usurpations of the character mentioned in the statute, by information in the nature of *quo warranto*;[25] but in other respects the common law limits for the application of such informations continues, and the common law jurisdiction remains.[24]

GIDEON D. BANTZ.

[23] Tanc. Quo. War., 10-17; Cole Crim. Inf., 113, 114, 122, *et seq.*

[24] Tanc. Quo War., 13, 18, *et seq.*

ASSIGNMENT—OF PART OF A DEMAND—AT LAW—IN EQUITY—INSOLVENT LAWS.

JAMES v. CITY OF NEWTON, AND ROYAL GILKEY, ASSIGNEE, IN INSOLVENCY.*

Supreme Judicial Court of Massachusetts. September 8, 1886.

1. At law, a debtor cannot be compelled to pay an entire debt in parts, either to the creditor or to assginees of the creditor, unless he promises so to do.

2. But it seems that it has not been decided in this State that there cannot be an assignment of a part of a fund or debt which will constitute an equitable lien or charge upon it, and which will be enforced in equity against the debtor or person holding the fund. That the debtor is a municipality makes no difference.

3. In a suit in eqnity, where the debt remained unpaid, and the debtor in its answer asked the court to determine the rights of different claimants to the fund for its payment, and a part thereof had been assigned by the creditor by an order in writing, such assignment not being in fraud of the insolvent law: *Held*, that the debtor should be decreed to pay to the payee specified in the creditor's order the portion of the money due from it specified therein, and to pay the remainder thereof, after deducting its costs, to the assignee in insolvency of the creditor.

In equity. Reserved for the full court.

Bill in equity by Edward B. James, setting forth that one William H. Stewart, on August 14, 1883, entered into a contract in writing with the city of Newton to build a school house for said city; that Stewart thereupon entered upon the performance of his part of the contract, and had nearly fulfilled the same, when, becoming financially embarassed, on June 13, 1884, a meeting of his creditors was held, and they voted to accept the offer of Stewart, to-wit: the sum of twenty cents on the dollar, in full settlement of their respective claims; that on June 21, 1884, for the purpose of enabling him to carry out his said contract with said city, and to fulfill his agreement with the said several creditors, the said Stewart applied to the said James for a loan of money; whereupon, the said James, in good faith and for the purpose aforesaid, let him have a certain sum, to-wit: $575, and took an assignment, by the terms of which, "in consideration of $600 to be paid by Edward B. James, of Cambridge," said Stewart did "sell, assign, transfer and make over to the said James the sum of $600, now due and to become due and payable to me from the city of Newton * * * under and by virtue of a contract between the said city and myself, for building a grammar-school house, dated August 14, 1883. It is agreed that said sum of $600 shall be paid out of the money reserved as a guaranty by said city, and at the time the same would become payable to me according to the terms of said contract, and that I will finish the said building, and perform my part of said contract, according to its terms." Immediately after the taking of the assignment, the said James notified the city of Newton.

The bill further sets forth that June 26, 1885, the said Stewart, by reason of the refusal of certain creditors, to the amount of about $3,000, to accept the said twenty cents on a dollar, filed a petition in insolvency in the county of Middlesex, and on July 10, following, said Royal Gilkey was duly electcd assignee of said Stewart; that before and after the filing of his said petition, said Stewart expended the greater portion of said $575 in the further completion of his said contract with said city, and made a proper and legitimate use of all said sum; that at the time of filing said petition there was due said Stewart under said contract the said sum of $600 or more, though not then payable; that after the said Gilkey was appointed assignee he substantially completed the said contract with the city of Newton, whereby, under said contract, there became due the sum of $3,238 or thereabouts, the most of which sum had been paid to said Gilkey as assignee, the said city reserving, on account of this assignment, a sum sufficient to pay the same; that the said city has been ready and willing to make a severance of the sum due under said contract, to pay the said James the amount of the assignment, and the said Gilkey the balance, if it could legally do so; but has been forbidden so to do by said Gilkey, who, as assignee aforesaid, claimed the whole amount due under said contract, and had begun a suit at law therefor, which was pending at the time of bringing this bill. The prayer of the bill was, that the suit at law pending between said Gilkey, as said assignee, and said city of Newton, be stayed to await the determination of this suit; that the said city of Newton be enjoined from payment of the said sum of $600 to the said Gilkey, and that the said sum of $600 be decreed to be paid to the plaintiff by the said city of Newton.

The defenadant city of Newton in its answer stated that it was and always had been ready and willing to pay said balance to such person or persons as should be justly entitled to receive the same, whether said plaintiff or said Gilkey, as such assignee. The defendant also prayed that

* S. C., 2 New England Reporter, 820.

said plaintiff and said Gilkey might interplead, and settle and adjust their demands between themselves.

It was agreed that the plaintiff James, and Wm. H. Stewart, at the time of the execution of the assignment or order, knew that said Stewart was actually insolvent and had called a meeting of his creditors, and that they had voted, or a majority of them, to accept twenty cents on the dollar of their claim; and said Stewart represented to said James that he was obtaining this money to assist him to complete the contract and to effect the composition of twenty cents on the dollar, and assured him that he could do so. No action or vote was ever had or taken upon said assignment by the city of Newton, by the city council, or either branch thereof, by any committee, or by any person authorized to bind the city. The assignee Gilkey, when he was appointed, had substantially no funds of the estate of said Stewart in his possession, and, in order to complete said contract, expended about $1,200 of his own funds in labor and material in finishing the building, and paid off out of the funds in the hands of the city, eventually paid him, mechanics' liens thereon amounting to about $500, besides. Said James actually paid and loaned said Stewart the sum of $575 at the time of the execution of said assignment, which was the sum agreed upon between the two.

The case, after hearing in the superior court before Knowlton J., was reserved for the consideration of the full court.

Mr. C. C. Powers, for complainant; *Mr. W. B. Durant*, for defendant Gilkey, assignee; *Mr. W. Slocum*, for defendant city of Newton.

FIELD, J., delivered the opinion of the court:

The assignment in this case is a formal assignment for value of "the sum of $600, now due and to become due and payable to me" from the city of Newton, under and by virtue of a contract for building a grammar-school house, and it is agreed that this sum "shall be paid out of the money reserved as a guaranty by said city," and the assignee is empowered "to collect the same."

There is no doubt that it would operate as an assignment, to the extent of $600, if there can be an assignment, without the consent of the debtor, of a part of a debt to become due under an existing contract; and the cases that hold that an order drawn on a general or a particular fund is not an assignment *pro tanto*, unless it is accepted by the persons on whom it is drawn, need not be noticed. That a court of law could not recognize and enforce such an assignment except against the assignor, if the money came into his hands, is conceded. The assignee could not sue at law in the name of the assignor, because he is not an assignee of the whole of the debt. He could not sue at law in his own name, because the city of Newton has not promised him that it will pay him $600. The $600 is expressly made payable "out of the money reserved as a guaranty by said city," and, by the contract, the balance reserved was payable as one entire sum; and at law a debtor cannot be compelled to pay an entire debt in parts, either to the creditor or to assignees of the creditor, unless he promises to do so. Courts of law originally refused to recognize any assignments of choses in action made without the assent of the debtor, but now, for a long time, they have recognized and enforced assignments of the whole of a debt by permitting the assignee to sue in the name of the assignor, under an implied power, which they held to be irrevocable. Partial assignments such courts have never recognized, because they hold that an entire debt cannot be divided into parts by the creditor without the consent of the debtor. It is not wholly a question of procedure, although in common-law procedure is not adapted to determining the right of different claimants to parts of a fund or debt. The rule has been established, partially at least, on the ground of the entirety of the contract, because it is held that a creditor could not sue his debtor for a part of an entire debt; and if he brought such an action and recovered judgment, the judgment was a bar to an action to recover the remaining part. There must be distinct promises in order to maintain more than one action. Warren v. Comings, 6 Cush. 103.

It is said that in equity there may be, without the consent of the debtor, an assignment of a part of an entire debt. It is conceded that as between assignor and assignee there may be such an assignment. The law, that if the debtor assents to the assignment in such a manner as to imply a promise to the assignee to pay to him the sum assigned, then the assignee can maintain an action, rests upon the theory that the assignment has transferred the property in the sum assigned to the assignee, as the consideration of the debtor's promise to pay the assignee; and that by the promise the indebtedness to the assignor is *pro tanto* discharged. It has been held by courts of equity, which have hesitated to enforce partial assignments against the debtor, that if he brings a bill of interpleader against all the persons claiming the debt or fund, or parts of it, the rights of the defendants will be determined and enforced, because the debtor, although he has not expressly promised to pay the assignees, yet asks that the fund be distributed or the debt paid to the different defendants, according to their rights as between themselves and the rule against partial assingnments, established for the benefit of the debtor. Supt. of Public Schools v. Heath, 15 N. J. Eq. 22; Fourth Nat. Bank v. Noonan, 14 Mo. App. 243.

In many jurisdictions courts of equity have gone further, and have held that an assignment of a part of a fund or debt may be enforced in equity by a bill, brought by the assignee against the debtor and assignor, while the debt remains unpaid. The procedure in equity is adapted to determining and enforcing all the rights of the

parties; and the debtor can pay the fund or debt into court, have his costs, if he is entitled to them, and thus be compensated for any expense or trouble to which he may have been put by the assignment. But some courts of equity have gone further, and have held that, after notice of a partial assignment of a debt, the debtor cannot rightfully pay the sum assigned to his creditor, and if he does, this is no defense to a bill by the assignee. The doctrine, carried to this exent, effects a substantial change in the law. Under the old rule, the debtor could with safety settle with his creditor and pay him, unless he had notice or knowledge of an assignment of the whole of the debt; under this rule he cannot, if he had notice or knowledge of an assignment of any part of it. It may be argued that if a bill in equity can be maintained against the debtor by an assignee of a part of the debt, it must be on the ground, not only that the plaintiff has a right of property in the sum assigned, but also that it is the debtor's duty to pay the sum assigned to the assignee; and that if this is so it follows that after notice of the assignment the debtor cannot rightfully pay the sum assigned to the assignor. The facts of this case, however, do not require us to decide whether a bill can be maintained after the debtor has paid the entire debt to his creditor, although after notice of a partial assignment.

The city of Newton in its answer says, that it "is willing to pay said balance to such person or persons as should be justly entitled to receive the same, whether said plaintiff, or said Gilkey, as such assignee;" and prays "that said plaintiff and said Gilkey may interplead, and settle and adjust the demand between themselves; and that the honorable court shall order and decree to whom said sum shall be paid." This is in effect asking the aid of the court in much the same manner as if the city of Newton had brought a bill of interpleader; and the proceedings are not open to the objection that the court is compelling the city of Newton to assent to an asssignment against its will.

This is the first bill in equity to enforce a partial assignment of a debt which has been before this court. It has been often declared here that there cannot be an assignment of a part of an entire debt, without the assent of the debtor, but the cases are all actions at law, and in the majority of them the statement was not necessary to the decision.

In Tripp v. Brownell, 12 Cush. 376, the action was assumpsit to recover the amount of the plaintiff's lay as a mariner on a whaling voyage. The defense was an assignment of the balance due, made by the plaintiff and accepted by the defendants. This was held a good defense, the court saying: "It is in terms an assignment of the whole lay; it must be so by operation of law. It is not competent for a creditor to assign part of the debt or create any lien upon it. The debtor or holder of the assignable interest cannot, without his own consent, be held legally or equitably liable to an assignee for part, and to the original creditor or another assignee for another part. Mandeville v. Welch, 5 Wheat., 277 (18 U. S. bk. 5, L. ed. 87); Gibson v. Cooke, 20 Pick. 45; Robbins v. Bacon, 3 Greenl., 346."

Gibson v. Cooke, *ubi supra*, was assumpsit brought in the name of Gibson, for the benefit of Plympton, to whom Gibson had given an order on the defendant to pay Plympton $175.33, "as my income becomes due." The defendant held property in trust to pay over the "net proceeds once a quarter" to Gibson and others. The court held that it did not appear that, "at the time of the assignment, or at any period since, the whole amount due to Gorham Gibson would correspond with the amount of the draft," and that "a debtor is not to have his responsibilities so far varied from the terms of his original contract as to subject him to distinct demands on the part of the several persons, when his contract was one and entire."

Knowlton v. Cooley, 102 Mass., 233, was trustee process, and the trustee had in his hands $147, due the defendant as wages, and the claimant held an order, given by the defendant before the wages were earned, for the payment to him of the defendant's wages, "as fast as they became due, to the amount of $150," which the trustee had accepted. The court held that the order was an assignment of wages, and, not having been recorded, was invalid against trustee process by Stat. 1865, chap. 43, § 2. The court says that "the acceptance of the order by Barton (the trustee) does not change its character. His assent was necessary to give it any validity, even as an assignment. Gibson v. Cooke, 20 Pick., 16."

Papineau v. Naumkeag Steam Cotton Co., 126 Mass. 372, was an action of contract, and the court says: "The order of Couillard on the defendant, in favor of the plaintiff, was not an order for the payment of all that should be due the drawer at the several times when the installments were to be paid. It was not, therefore, an assignment of wages to the plaintiff, unless the defendant saw fit to assent to it as such, but a mere order for money." It is settled that an assignment of a part of a debt, if assented to by the debtor in such a manner as to imply a promise to pay it to the assignee, is good against trustee process or against an assignee in insolvency. Taylor v. Lynch, 5 Gray, 49; Lannan v. Smith, 7 Gray. 150.

In Bourne v. Cabot, 3 Met. 305, the court says: "The order of Litchfield on the defendant was a good assignment of the fund *pro tanto* to the plaintiff, and the express promise to the assignee to pay him the balance when the vessel should be sold constituted a legal contract." It is also settled that an equitable assignment of the whole fund in the hands of the trustee is good against trustee process, although the trustee has received no notice of the assignment until after the trustee process was served, and has never assented to it. Wakefield v. Martin, 3 Mass. 558; Kingman v.

Perkins, 105 Mass. 111; Norton v. Piscataqua F. & M. Ins. Co., 111 Mass. 532; Taft v. Bowker, 132 Mass. 277; Williams v. Ingersoll, 89 N. Y. 508.

Before, as well as since, Stat. 1865, chap. 43, § 1 (Pub. Stat. chap. 183, § 38), if the assignment was for collateral security, and the assignee was bound to pay immediately to the assignor, out of the sum assigned, any balance remaining after payment of his debt, it has been held that the excess above the debt for which the assignment was security was attachable by the trustee process. Warren v. Sullivan, 123 Mass. 283; Giles v. Ash, 123 Mass. 353; Macomber v. Doane, 2 Allen, 541; Darling v. Andrews, 9 Allen, 106. See Lannan v. Smith, 7 Gray, 150.

In Macomber v. Doane, *ubi supra*, the court says that "an order constitutes a good form of assignment, it being for the whole sum due or becoming due to the drawer, and it needs not to be accepted to make it an assignment." The order was for one month's wages, which, as subsequently ascertained, amounted to $37.50; but it was given as security for groceries furnished and to be furnished, and on the day of the service of the writ, the defendant owed the claimant for groceries $28.79, and the remaining $8.71 was held by the trustee process. Some of these cases were noticed in Whitney v. Eliot Bank, 137 Mass. 351, and the court then declined to decide "whether in equity there may not be an assignment of a part of a debt."

Without considering the cases upon the effect of orders or drafts for money as constituting assignments of the debt or a part of it, it seems never to have been actually decided in this commonwealth that an assignment for value, of a part of an entire debt, is not good to the extent of the assignment against trustee process. In trustee process, the trustee of the defendant, if charged, is, by the statute, compelled to pay to the plaintiff so much of what he admits to be due to the defendant as is necessary to satisfy the plaintiff's judgment; and as an entire debt may thus be divided, it seems equitable that assignees of a part of the debt should be admitted as claimants, and this is in effect done when the assignment is as collateral security.

Palmer v. Merrill, 6 Cush. 282, was assumpsit against the administrator of Spaulding, who had caused his life to be insured payable to himself, his executors, administrators or assigns, and he, "by a memorandum in writing, indorsed on the policy, for a valuable consideration, assigned and requested the insurers to pay the plaintiff the sum of $400, part of the sum insured by the policy, in case of loss on the same, of which assignment and request the insurers on the same day had due notice." "The policy with this indorsement thereon remained in the custody of Spaulding until his decease," and came into the hands of the administrator of his estate, who collected the whole amount of the insurance, and represented the estate insolvent; and the question was "whether the case shows an assignment which vested any interest in the policy, legal or equitable, in the plaintiff." The court held that it did not. The court say: "According to the modern decisions, courts of law recognize the assignment of a chose in action, so far as to vest an equitable interest in the assignee, and authorize him to bring an action in the name of the assignor, and recover judgment for his own benefit. But in order to constitute such an assignment, two things must first concur: first, the party holding the chose in action must by some significant act express his intention that the assignee shall have the debt or right in question, and, according to the nature and circumstances of the case, deliver to the assignee or to some person for his use, the security, if there be one, bond, deed, note or written agreement upon which the debt or chose in action arises; and, secondly, the transfer shall be of the whole and entire debt or obligation of which the chose in action consists, etc.;" that "it appears to us that the order indorsed on the policy, and retained by the assured, fails of amounting to an assignment in both these particulars," and that an order "for a part only of the fund or debt is a draft or bill of exchange, which does not bind the drawee, or transfer any proprietary or equitable interest in the fund until accepted by the drawee. It, therefore, creates no lien upon the fund. Upon this point the authorities seem decisive. Welch v. Mandeville, 1 Wheat. 233 (14 U. S. bk. 4, L. ed. 79); s. c., 5 Wheat. 277 (18 U. S. bk. 5, L. ed. 87); Robbins v. Bacon, 3 Greenl. 346; Gibson v. Cooke, 20 Pick. 15."

Welch v. Mandeville, *ubi supra*, was an action of covenant broken, brought by Prior, in the name of Welch, against Mandeville, who set up a release by Welch; to which Prior replied that Welch, before the release, had assigned the debt due by reason of the covenant to him, of which the defendant had notice. The court considers the effect of certain bills of exchange, and says: "But where the order is drawn, either on a general or a particular fund, for a part only, it does not amount to an assignment of that part, or give a lien against the drawee, unless he consents to the appropriation, by an acceptance of the draft," etc.; that "a creditor shall not be permitted to split up a single cause of action into many actions without the assent of his debtor," and that "if the plaintiff could show a partial assignment to the extent of the bills, it would not avail him in support of the present suit."

The equitable doctrine now maintained by the Supreme Court of the United States, is shown by Wright v. Ellison, 1 Wall. 16 (66 U. S. bk. 17, L. ed. 555); Christmas v. Russell, 14 Wall. 70 (81 U. S. bk. 20, L. ed. 762); Trist v. Child, 21 Wall. 441 (88 U. S. bk. 22, L. ed. 623); and Peugh v. Porter, 112 U. S. 737 (bk. 28, L. ed. 859).

In Peugh v. Porter, that court ordered that a decree be entered that Peugh, subject to certain rights in the estate of Winder, was entitled to one-

fourth of a fund, by virtue of an assignment of one-fourth of a claim against Mexico, made before the establishment of the claim, from which the fund was derived, and before the fund was in existence, and declared the law to be that "it is indispensable to a lien thus created, that there should be a distinct appropriation of the fund by the debtor, and an agreement that the creditor should be paid out of it."

In Robbins v. Bacon, *ubi supra*, the order was for the payment of the whole of a particular fund, and was held good. The existing law of Maine is declared in National Exchange Bank v. McLoon, 73 Me. 498, by an elaborate opinion, and the conclusion reached is, that an assignment of a part of a chose in action is good in equity and against trustee process.

In England, it is held that the particular fund or debt out of which the payment is to be made must be specified in the assignment (Percival v. Dunn, 29 Ch. Div, 128); but the assignment of a part of a debt or fund is good in equity. The present case is like *Ex parte* Moss, L. R. 14 Q. B. D. 310, and a stronger case for the plaintiff than Brice v. Bannister, L. R. 3 Q. B. D. 569, where, although the procedure was under the statute of 36 and 37 Vict., chap. 66, the foundation of the liability was, that the assignment was good in equity, and the case at bar is relieved from the difficulties which induced Brett, L. J., in that case, to dissent, and Brice v. Bannister was affirmed in *Ex parte* Hall, L. R. 10 Ch. Div. 615. The present case also resembles Tooth v. Hallett, L. R. 4 Ch. App. 243, except that there the sums paid by the trustee for creditors in finishing the house exhausted all that became due under the contract. See also Addison v. Cox, L. R. 8 Ch. App. 76.

In Appeals of the City of Philadelphia, 86 Pa. St. 179, it is conceded that the rule, that an assignment of a part of a debt is valid, prevails in equity between individuals; but the court refuses to apply it to a debt due from a municipal corporation, on the ground that "the policy of the law is against permitting individuals by their private contracts to embarrass the principal officers of a municipality," (see Geist's Appeal, 104 Pa. St. 354); but there is no ground for any such distinction in this commonwealth.

In New York, the assignment of a part of a debt or fund is good in equity (Field v. Mayor, etc., 2 Selden, 179; Risley v. Phoenix Bank of N. Y. 318); and the same doctrine is maintained in other States. Daniels v. Meinhard, 53 Ga. 359; Etheridge v. Varnoy, 74 N. C. 809; Lapping v. Duffy, 47 Ind. 51; Fordyce v. Nelson, 91 Ind. 447; Bower v. Hadden Blue Stone Co.,30 N. J. Eq. 171; Gardner v. Smith, 5 Heisk. 256; Grain v. Aldrich, 38 Cal. 514; Des Moines v. Hinkley, 62 Iowa, 637; Canty v. Latterner, 31 Minn. 239; First Nat. Bank v. Kimberlands, 16 W. Va. 555.

From the examination of our cases it appears not to have been decided that there cannot be an assignment of a part of a fund or debt which will constitute an equitable lien or charge upon it, and will be enforced in equity against the debtor or person holding the fund. Palmer v. Merrill, *ubi supra*, may well rest upon the first reason given for the decision. See Stearns v. Quincy Ins. Co. 124 Mass. 63.

The decisions of courts of equity in other jurisdictions are almost unanimous in maintaining such a lien, where the assignment is for value,and distinctly appropriates a part of the fund or debt, and makes the sum assigned specifically payable out of it.

Without undertaking to decide what is not before us, and confining ourselves to the facts in the case, which are that the debt remains unpaid, and the debtor in his answer asks the court to determine the right of the different claimants, we think that there should be a decree that the city of Newton pay to the plaintiff $600, and that the remainder of the sum due from the city, after deducting its costs, be paid to Gilkey, assignee.

The assignment was not made in fraud of the law relating to insolvency.

So ordered.

NOTE.—The reason why, at law, an assignment of part of a debt or demand is void unless it has been assented to, or ratified by the debtor is very obvious. The law requires of all parties to a contract due performance of their respective engagements, and it likewise excludes any obligation varying from the true intent and meaning of the contract. Mr. Justice Story says:[1] "He has a right to stand on the singleness of his original contract, and to decline any legal or equitable assignment by which it may be broken into fragments. When he undertakes to pay an integral sum to his creditor, it is no part of his contract that he shall be obliged to pay in fractions to any other persons." It is well settled that a creditor cannot split an entire demand into distinct parts and maintain separate actions at law on each. In such a case a recovery in one action bars the others,[2] and if he cannot do this himself, he cannot, by an assignment, enable others to do it.

If, however, the assignment of part of a demand is made with the knowledge and consent of the debtor, the assignee may sue upon it without making other holders of the demand parties to the suit.[3] What constitutes such knowledge and consent may sometimes become a question. In a Massachusetts case,[4] it was held that a check on a bank for part of the drawer's funds does not become an assignment until it has been presented to, and accepted by the bank, and that the assent by the cashier, when absent from the bank, will not validate the assignment. And if the assent and acceptance of part of a demand is conditional, dependent upon the happening of some future event, the assignment and acceptance were held equally void if the event did not occur.[5]

[1] Mandeville v. Welch, 5 Wheat. 286.

[2] Smith v. Jones, 15 Johns. 229; Willard v. Sperry, 16 Johns. 121; Marzion v. Posche, 8 Cal. 536; Herriter v. Porter, 23 Cal. 385.

[3] Grain v. Aldrich, 38 Cal. 514.

[4] Bullard v. Randall, 1 Gray, 605.

[5] Lindsay v. Price, 33 Tex. 280.

In Missouri, it has been held that where a claimant or a creditor assigns a portion of his demand without the consent of the debtor, the assignee cannot recover on the portion so assigned. The court goes further and holds, contrary to the usually received doctrine on the subject, that the rule applies as well in equity as at law; and still further, that if the demand is unliquidated, disputed, and in litigation, the assignor may disregard his assignment and compromise the whole claim.[6] In support of the doctrine that the rule in question applies as well in equity as at law, the court cites and distinguishes several English cases, which are relied upon by Mr. Justice Story to support the precisely opposite doctrine.[7] These cases, the Supreme Court of Missouri insists, do not sustain the *dictum* of the learned author. One case,[8] the court says, was "more in the nature of an appropriation out of a particular fund than the assignment of a portion of a debt," and, further, that in that case the debtor not only received without objection a duplicate of the order, but paid a portion of the money to the assignee. In another case,[9] the like facts appear. Lord Commissioner Eyre describes the transaction as an appropriation of a fund, and Lord Commissioner Ashurst says: "This is not a debt, but a standing authority to Everett to give the other parties the same remedy."

It is manifest, as the Supreme Court of Missouri insists, that these cases do not give any material support to the doctrine that a creditor may (in equity) divide his claim into as many parts as he pleases, even as many as there are dollars in the demand, assign each to a different person, and then "appeal to a court of conscience to countenance and enforce such oppressive and inequitable transfers."[10] It must, however, be admitted that the authorities so profusely cited in the principal case would seem to establish the rule, unreasonable as it may seem, and that the Missouri ruling is not in accord with the current of authority."[11]—ED. CENT. L. J.

[6] Burnett v. Crandall, 63 Mo. 410; See, also, Love v. Fairfield, 13 Mo. 301.

[7] 2 Story Eq. Juris., § 1044.

[8] Lett v. Morris, 4 Simons, 607.

[9] Smith v. Everett, 4 Bro. Ch. 64.

[10] Burnett v. Crandall, *supra*.

[11] See, also, on this subject, Kirtland v. Moore (N. J.), 1 Cent. Rep. 466; Supt. Schools v. Heath, 15 N. J. Eq. 22; Shannon v. Hoboken, 37 N. J. Eq. 123, 318.

MUNICIPAL CORPORATION—NEGLIGENCE FOR DANGEROUS CONDITION OF SIDEWALK—KNOWLEDGE OF POLICEMAN—EVIDENCE, PRIVILEGED COMMUNICATION, HOW WAIVED.

CARRINGTON v. CITY OF ST. LOUIS ET AL.

Supreme Court of Missouri, June 7, 1886.

1. *Negligence—Dangerous Condition of Sidewalk—Knowledge of City.*—While a city is liable for the negligent use of its property, and the duty and consequent liability to keep its sidewalks in a reasonably safe condition extends to those cases, where the unsafe condition is occasioned by persons other than its agents and officers, yet, before a recovery can be had, it must be shown that the city had notice of the defect, or ought to have known of it, by the exercise of reasonable care and watchfulness.

2. ——*Knowledge of Defect—Lapse of Time as an Element—When Question for Jury.*—Negligence in not knowing of a defect may be shown by circumstances, including the lapse of time during which the defect existed, and where the injury is occasioned by the plaintiff falling into certain iron trap-doors, covering a cellar-way opening into a building, which are allowed to stand open for four or five hours, and where it appears that the sidewalk in that particular place is much resorted to for travel, it is proper to submit the question of negligence to the jury.

3. *Agents and Officers—Policeman in City of St. Louis are—Their Knowledge, Knowledge of City.*—Under the Act of the general assembly, establishing a board of police commissioners in the city of St. Louis (chap. 6, appendix to vol. 2, R. S. 1879, Mo.), consisting of five members, where four are appointed by the governor of the State, and the mayor of the city is *ex officio* a member of such board, and where the members of the police force are appointed by such board, who are under its exclusive control, and not subject to interference of the municipal assembly of said city, such police force constitutes a department of the city government, and the policemen are agents or officers of the city, and their knowledge is knowledge of the city. Attwater v. Mayor of, 31 Md. 463, distinguished.

4. *Negligence—Liability of City for Negligence of its Officers.*—A municipal corporation is not liable for the wrongful and negligent acts of its police, or other officers in the execution of the powers conferred upon the corporation or officers for the public good, and not for private corporate advantage, unless made so by statute law, expressly or by implication.

5. *Evidence—Physician and Patient Privileged Communications—How Waived.*—A statute which provides that a physician and surgeon shall be incompetent to testify as to information acquired from the patient in his professional capacity (R. S. Mo., 1879, § 4017), is for the protection of the patient, and may be, and is waived, by the latter by calling the physician to testify as to information thus acquired.

O. G. Hess, for respondent; and *Leverett Bell*, for the city, appellant.

BLACK, J., delivered the opinion of the court:

The plaintiff, a minor, brought this suit by his next friend to recover damages for injuries sustained by falling against iron-trap-doors in a cellar-way in the city of St. Louis. The doors covered a cellar-way opening into a building used and occupied by the police commissioners as a police station. The defendant Balte, who was a member of the police force, opened the doors, painted them, propped them open with a stick, and left them in that condition to dry. Plaintiff fell upon them and received severe injuries.

It is the duty of the city to keep its streets and sidewalks in a reasonably safe condition for persons traveling thereon with ordinary care and caution. This duty, and a consequent liability, extends to those cases where the obstruction or unsafe condition of the street is brought about by persons other than the agents of the city. Bassett v. St. Joseph, 53 Mo. 298; Russell v. Columbia, 74 Mo. 490. But in such case it devolves upon the plaintiff to show that the city had notice of the defect, or ought to have had knowledge thereof, by the use of reasonable care and watchfulness.

The court told the jury that Balte was not the agent of the city, and that his negligence was not its negligence, and left it to them to determine "whether the dangerous condition of the sidewalk and cellar-way was known to the city, or by the use of ordinary care might have been known to it in time to have the same safe, and thus prevent the injury."

Assuming that the policeman was not the agent of the city, and there is no evidence that any agent knew of the defect, obviously, then, under the principles of the law before stated, and the instruction which is in conformity therewith, the question is: Was there evidence entitling the case to go to the jury on the ground that the defendant should have known of the defect? Negligence in not knowing of the dangerous condition of the doors may be shown by circumstances, including the lapse of time during which the defect existed. Besides, the undisputed facts before stated, the evidence tends to show that the doors were seen open between one and two o'clock in the afternoon, and continued propped open till the boy got hurt, about half-past five o'clock of the same afternoon; that it was dark when the boy fell upon the doors, though the street lamps at that particular place and the gas jets at the station had not been lighted, and that the sidewalks of that particular place was much resorted to for travel, so much so that scarcely ten seconds of time intervened between the time when persons would pass and repass both day and night. The sidewalk was ten feet wide, and the door extended out from the building into the walk four feet eight inches. The evidence, we hold, fully justified the court in submitting the question to the jury. Much depends upon the surroundings in cases of this character, for what might be negligence in not knowing of a dangerous condition of a sidewalk at one locality in a city would not be at another. The walk was much used and resorted to, and that called for increased care on the part of the city.

But was Balte, the policeman, an agent or officer of the city of St. Louis? If he was not, it is by reason of the various special acts of the general assembly establishing a board of police commissioners within and for the city of St. Louis. (Chapter 6, appendix to vol. 2, R. S. 1879.) By these acts four of the commissioners are appointed by the governor. The mayor of the city is *ex-officio* a member of the board. The members of the police force are appointed by the commissioners, removed by them, and under their exclusive control, and not subject to the orders of, or interference by, the municipal assembly. The commissioners and the force under them are charged with such duties as are usually imposed upon public officers, and are commanded, among other things, to "protect the rights of persons and property," and to "prevent and remove nuisances on all streets, highways, waters and other places." The commissioners are required to make an estimate annually of the amount of money necessary to enable them to discharge their duties and to certify the same to the municipal assembly, and that body is required to make an appropriation therefor, and the disbursing officer of the city is to make payment to the commissioners on their requisition. By a subsequent act, passed in 1865 (sections 20 and 22 of said chap. 6), the municipal assembly has power to increase the police force and to increase or diminish and regulate the pay of police upon the recommendation of the commissioners. By a still subsequent act, passed in 1873 (section 23 of chap. 6), the municipal assembly has "power to fix the salaries of the police force," not to exceed certain designated amounts. Section 33 of the same compiled laws (Vol. 2., p. 1535, R. S. 1879) is as follows:" "The members of the police force in the city of St. Louis, organized and appointed by the police commissioners of said city, are hereby declared to be officers of the city of St. Louis, under the charter and ordinances thereby, and also to be officers of the State of Missouri, and shall be so deemed and taken to all courts having jurisdiction of offenses against the laws of the State, or the ordinances of the said city." All private watchmen, detectives, and policemen serving in the city are to obtain a license from the president of the commissioners.

It is plain from the provisions of the law that the police force constitutes a department of the city government. While these officers are State officers for some purposes, they are also city officers. They are none the less city officers because, of reasons deemed best to the legislature, they are under the control of the commissioners, and not the assembly. We see that by express law they are made city officers. No such declarations seem to have been made in the statute with respect to the board of police commissioners of Baltimore, under which the case of Attwater v. The Mayor of, 31 Md. 463, was decided. There it was held the city was not liable for a failure to remove a nuisance from a public street, because the power to remove the nuisance was lodged in the police and not in the city, and the police officers were held not to be city officers. The difference between the statute there and here is material. But though we must conclude that Balte was an agent of the city, yet it does not follow that the city is liable for all his negligent acts. The rule of law is well settled, that a municipal corporation is not liable in damages for the wrongful or negligent acts of its police or other officers in the execution of powers conferred upon the corporation or officers for the public good, and not for private corporate advantage, unless made liable by statute law, expressly or by implication. Armstrong v. Brunswick, 79 Mo. 319: Kiley v. City of Kansas, not yet reported; Dill. Mun. Corp. (3rd ed.) § 975; Nusting v. St. Louis, 44 Mo. 479. But we do not see how these principles of the law can aid the defendant

here, for it is the unquestionable duty of the city to keep its streets and sidewalks in a reasonably safe condition for persons traveling thereon, and it is liable in damages to one injured by reason of negligence in this behalf. Again, the city is liable for the negligent use of its property, the same as a private corporation. Dill. Mun. Corp. (3rd ed.) § 985.

The bill of exceptions in this case recites that it was shown by the defendant that the police station, the buildings, belonged to and was occupied by the board of police commissioners. We do not understand by this that the title to the property was in them, or that they could hold the title to real estate. The building was evidently furnished by or at the expense of the city of St. Louis. We conclude that as to the act in question Balte was the officer and agent of the city, and that knowledge of the condition of the trap-doors was notice to, and knowledge thereof, on the part of the city.

The statute which says a physician or surgeon shall be incompetent to testify concerning any information, which he may have acquired from any patient while attending him in a professional character (R. S. 1879, § 4017), does not create an absolute disqualification. The secrecy enjoined upon the physician and surgeon is for the protection of the patient, and may be waived. The patient does waive the privilege by calling the physician as a witness to testify as to information thus acquired. Groll v. Tower (S. C. Mo. not yet reported). There was therefore no error in allowing the surgeon to testify, should he be within the purview of the statute, a question which is not considered. The judgment is affirmed. All concur.

NOTE:—Municipal corporations are recognized as bodies exercising some of the functions of government, and as to such functions it is but proper that they should enjoy the same immunity from liability that the State enjoys. Since the theories of government differ, the interpretation of governmental functions must differ. At the same time a municipal corporation is endowed with powers whose exercise benefits only its citizens, and which are often very profitable to its treasury. As to such powers the municipality is a private corporation, as distinguished from the public at large, and should be subject to the same liabilities as other private corporations. Courts have endeavored to separate the public functions of a municipality from its private powers. Accordingly, it has been held, that, in the absence of a statute to the contrary, there is no liability in a municipality for its negligence or that of its agents. Where the duty to be performed is to be exercised for the benefit of the public generally, in which the municipality has no particular interest, and from which it derives no special benefit in its corporate capacity;[1] also where the law imposes the same duties on all similar corporations, and from which they derive no compensation or benefit in their corporate capacity;[2] or where they act in their political, discretionary and legislative authority;[3] or when acting in their governmental functions.[4] Again, exemption has been asserted, on the ground that liability in such cases would be too onerous.[5] On the other hand, municipal corporations have been held liable, because they were acting therein for purposes of private advantage and emolument, though the public may have derived a common benefit;[6] or the duties were imposed by their consent, express or implied, or a special authority conferred at their request;[7] or the burden was imposed in consideration of the privileges granted in the charter, while the means to perform the duty were placed at their disposal;[8] or the corporation participated in or ratified, or derived a corporate advantage from the wrongful act.[9]

If the duties exercised are considered to be public, it is immaterial who appoints the officer, since in the discharge of such duties he is exercising the functions of the government, and cannot be considered as the agent of the municipality.[10]

Accordingly, they are exempted from all liability for the acts of their health officers and of all the employees thereof, or for any injury accruing from any of its agencies,[11] similarly relative to the fire department;[12] also relative to the police department in the preservation of order.[13] They are also charged with the care and preservation of their streets, but in accordance with the distinctions drawn above, they should be exempt from all liability relative thereto, and some courts consistently so hold,[14] but the authorities have so overwhelmingly adopted the other view that it may be considered to be the rule.[15]

Since all corporations must and can act only through agents, they should only be held liable for the negligence of such agents. If any one is injured by an obstruction placed in the streets by an officer of the city, or by one authorized by it to act in the matter, it is liable without notice to it;[16] otherwise the city must have been notified of the existence of the nuisance and have had time to remove it. Actual notice is not necessary, when it is proved that the nuisance has existed so long that the city would have known it, if it

1 Hayes v. Oshkosh, 33 Wis. 314.
2 Oliver v. Worcester, 102 Mass. 489.
3 Richmond v. Long, 17 Grat. 375.
4 Ogg v. City of Lansing, 35 Iowa, 495.
5 Wilcox v. Chicago, 107 Ill. 334; Jewett v. New Haven, 38 Conn. 368.
6 Bailey v. Mayor of New York, 3 Hill (N. Y.), 531; City of Navasota v. Pearce, 46 Tex. 525; Pittsburg v. Greer, 22 Pa. St. 54; Fennimore v. City of New Orleans, 20 La. An. 124.
7 Bigelow v. Inhab. of Randolph, 14 Gray, 541.
8 Weightman v. Corp. of Washington, 66 U. S. 39; Eastman v. Meredith, 36 N. H. 284.
9 Bryant v. City of St. Paul, 33 Minn. 289.
10 Maximilian v. Mayor, 62 N. Y. 160; Fisher v. Boston, 104 Mass. 87; City of Richmond v. Long, 17 Grat. 375; Ogg v. City of Lansing, *supra.*
11 Grube v. City of St. Paul, 33 Minn. 289; Maximilian v. Mayor, 62 N. Y. 160; Condict v. Mayor, 46 N. J. Law., 157.
12 Fisher v. Boston, *supra;* Howard v. San Francisco, 51 Cal. 52; Welsh v. Village of Rutland, 56 Vt. 228; Hafford v. City of New Bedford, 16 Gray, 297; Jewett v. New Haven, 38 Conn. 368.
13 Dill. Mun. Corp., § 975; Elliott v. Philadelphia, 75 Pa. St. 347; Campbell v. City, 53 Ala. 527; Caldwell v. Boone, 51 Iowa, 687.
14 City of Detroit v. Blackeby, 21 Mich. 84; Pray v. Mayor, 32 N. J. Law, 394; City of Navasota v. Pearce, 46 Tex. 525.
15 Billings v. Worcester, 102 Mass. 329; Barnes v. Dist. of Col., 91 U. S. 551; Kobs v. Minneapolis, 22 Minn. 159.
16 Russell v. Town of Columbia, 74 Mo. 480.

had exercised reasonable care in the supervision of its streets.[17]

There is no rule of law as to the length of time that the nuisance must have existed. It is a matter for the jury.[18] If, however, it has existed long enough to have become notorious, the city is presumed to have received notice thereof.[19]

The municipality is exempt from liability for its plan of street improvement, on the ground that its action is somewhat discretionary and judicial,[20] unless such plan is most glaringly dangerous and likely to produce injury. In case of doubt, the benefit thereof is given to the municipality.[21] But for negligence of its agents in executing such plan it is liable. But to hold such corporations liable, the negligent parties must be their agents. Since the legislature has full control of such corporations, such agents may be appointed in any way the law provides, either by the municipality or by any other power.[22]

Though these parties may exercise powers usually exercised by the municipality, they are not agents thereof, unless the law makes them so.[23] Such a corporation is not liable for the negligences of one of its officers relative to duties specifically imposed by statute or such officer,[24] nor for negligences of its officers relative to duties imposed upon them by law not relating to such municipality.[25]

It is well settled, that a municipality is liable for the negligent use of its own property, to the same extent as any other corporation or individual.[26]

Municipal corporations have often been relieved from all liability for acts of their officers, because such acts were beyond their corporate powers, were *ultra vires*, yet, when such acts were fairly within their discretionary powers, or did not antagonize public duties and were expected to be profitable, the municipalities have been held liable therefor.[27]

The courts do not harmonize on these subjects, and the only logical course seems to be to hold municipalities liable for all misfeasances and malfeasances, but not non-feasances, of all their authorized agents, and as legislation tends constantly more and more to the protection of the individual, rather than to that of the public, it is probable that such will be the result.

S. S. MERRILL.

[17] McLaughlin v. City of Corry, 77 Pa. St. 109; Hooley v. City of Meriden, 44 Conn. 117.

[18] Sheel v. City of Appleton, 49 Wis. 125; Colley v. Inhab. of Westbrook, 57 Me. 181.

[19] City of Lincoln v. Woodward, 27 N. W. Rep. 110; Kelleher v. City of Keokuk, 60 Iowa, 473; Goodnough v. City of Oshkosh, 29 Wis. 549; Requa v. City of Rochester, 45 N. Y. 129.

[20] Urquhart v. City of Ogdensburg, 91 N. Y. 67; Dill. Mun. Corp., §§ 494, 1051; City of Lansing v. Trolan, 37 Mich. 152; Child v. City of Boston, 4 Allen, 41.

[21] 2 Thomp. Neg., 731, *et seq.*; Gould v. City of Topeka, 4 Pac. Rep. 822.

[22] Bryant v. City of St. Paul, *supra*; Barnes v. Dist. of Col., *supra*.

[23] County Comms. v. Duckett, 20 Md. 468.

[24] Martin v. Mayor, 1 Hill (N. Y.) 545; Lorillard v. Town of Monroe, 11 N. Y. 392.

[25] Hickox v. Village of Plattsburgh, 15 Barb. 427.

[26] Bryant v. City of St. Paul, *supra*; Torney v. Mayor, 12 Hun, 546; City of Toledo v. Cone, 41 Ohio St. 149; Rochester W. L. Co. v. City of Rochester, 3 N. Y. 463; Eastman v. Meredith, 36 N. H. 284.

[27] Toledo v. Cone, *supra*; Moulton v. Scarboro, 71 Me. 267; City of St. Louis v. Steamboat Maggie P., 25 Fed. Rep. 202.

WEEKLY DIGEST OF RECENT CASES.

1. ACTION—*Survival — Ejectment.* — The action of ejectment does not survive at common law, or under the Wisconsin statutes, against the heirs of a deceased defendant, and an order reviving such an action cannot be sustained, in whole or in part, on the ground that one of the heirs purchased the land in controversy before the death of the original defendant, or because a claim for mesne profits is made by plaintiff, and one for money paid out for taxes and improvements by defendant. *Farrall v. Shea*, S. C. Wis., Oct. 12, 1886; 29 N. W. Rep. 634.

2. ASSIGNMENT FOR BENEFIT OF CREDITORS—*Sale—Mortgage.* — During the absence of the plaintiff from home, his son, who was a minor, sold a printing-press, and took the mortgage and notes securing the future payments in his own name. The son promised to transfer the notes and mortgage to the plaintiff, but neglected so to do. Subsequently a firm, of which the son was a member, failed, and they made an assignment for creditors' benefit. The assignee seized the printing-press, and foreclosed the mortgage, default having been made in its terms. The plaintiff brought suit to recover the press, and for the reformation of the notes and mortgage. *Held*, that he was entitled to the relief prayed for. *Wait v. Axford*, S. C. Mich., Oct. 21, 1886; 29 N. W. Rep. 693.

3. CARRIERS—*Ejectment of Passenger from Train—Duty of Passenger—Trial—Promise to Charge—Damages—Ejectment from Train—Eight Thousand Dollars not Excessive—Trial—Judge's Remark to Jury—Reference to Former Case—Appeal—Objections, when Raised—Language Used in Argument—Motion for New Trial—Charge—Request for Special Rulings Necessary—Assumption Contrary to Testimony.*—A lady passenger who is on a wrong train by the fault of defendant's agent, and who is put off at night at a lonely place, from where she walks back to the next station, being afraid to remain there, is not precluded from recovering damages for injuries received and fright suffered in walking back to the station, by the fact that she was unwilling either to pay fare for being carried further on the train, or to remain at the place where she was put off until the arrival of a return train. A party is not entitled to rely on the promise of the judge to charge a principle of law, instead of framing a special charge himself, and asking the judge to submit it to the jury. A verdict for $8,000 for damages for personal injuries received, and fright and mental anguish suffered, by a lady passenger, who, with two infant children, was put off from defendant's train on a dark night

at a lonely place, not a regular station, and, being afraid to seek shelter there among negroes, walked back several miles to a station, through swamps and over a high railroad bridge, and was obliged to engage for a guide a negro, who insulted her, *held*, not excessive. See 64 Tex. 536. Judgment will not be reversed on account of a remark of the judge to the jury, that all questions raised by the demurrer have been settled by the supreme court in a companion case, where the pleadings were substantially the same as in the case on trial, such being the fact. Objections to the language used by opposing counsel in argument, must be presented by motion for a new trial in the trial court, and cannot be availed of for the first time on appeal. A charge which, as far as it goes, gives the law, is not objectionable upon the ground of not setting forth with sufficient fullness the conditions under which the verdict should be for defendant, or upon the ground of not entering sufficiently into the particulars which distinguish remote from proximate causes, if special charges are not asked for upon these matters. A railroad company, defendant in an action for damages for putting plaintiff off a train, is not entitled to have the judge charge that, if plaintiff was a trespasser, and refused to pay fare, she could be put off at any station, if plaintiff's uncontradicted testimony shows that she was on the train by an innocent and natural mistake. *International, etc. Co. v. Smith*, S. C. Tex., Oct. 19, 1886; 1 S. W. Rep. 565.

4. ——*Goods Destroyed in Transit — Loss Caused by Owner's Act—Agreement that Owner Should Care for Goods—Code Iowa, § 1308—Constitutional Law—Commerce—Iowa Statute Prohibiting Carriers from Limiting Their Liability.*—A railroad company is not liable for the injury or destruction of property in the course of transportation, when the injury is occasioned by the owner's own act; and whether the act of the owner which caused the injury amounted to negligence or not is immaterial. Where the owner, by agreement with the carrier, undertook to care for the property in the course of transportation, and the property was destroyed through the act of the owner, the carrier is not liable for the loss, although the agreement between the owner and carrier may have been in violation of section 1308, Code Iowa, providing that "no contract, receipt, rule or regulation shall exempt any corporation engaged in transportation of persons or property by railway from liability of common carrier." A statute of Iowa prohibiting corporations engaged in transporting goods or passengers between different States from limiting their liability as common carriers, by contract, is not a regulation of commerce among the States. *Hart v. Chicago, etc. Co.*, S. C. Iowa, Oct. 11, 1886; 29 N. W. Rep. 597.

5. ——*Of Passengers—Passenger Thrown from Railroad Car by Other Passengers—Judgment—Non Obstante — Generel Verdict — Opposed to Special Findings.*—A railway company is not liable for the death of a passenger where he was killed by being thrown from a platform car by othe passengers, and there was nothing in the conduct of such passengers at the time the train left the last station from which the company could reasonably anticipate that an assault would be committed on the deceased by reason of furnishing such a car for transportation. A judgment *non obstante veredicto* should be granted where the general verdict is in conflict with the special findings. *Felton v. Chicago, etc. Co.*, S. C. Iowa, Oct. 14, 1886; 29 N. W. Rep. 618.

6. COMMERCIAL LAW—*Promissory Note—Construction—Estoppel—Prior Suit Against Corporation.*—A promissory note, reciting "we" promise to pay, and signed, "D. P. Livermore, Treas. Hallowell Gas-light Co.," is the note of the individual, and not of the corporation. In an action on a note, the fact that the plaintiff had previously brought suit against a corporation as maker on the same note, and obtained a default, but not a judgment, will not estop him from maintaining the action if the defendant was not induced to change his position thereby, to his injury. *McClure v. Livermore*, S. C. Me., Oct. 1, 1886; 6 Atl. Rep. 11.

7. CONSTITUTIONAL LAW—*Regulation of Commerce — Foreign Corporation — License — Act June 7, 1879—Railroads—Through Transportation—Interstate Commerce.*—A foreign corporation is subject to payment of the license fee imposed in the sixteenth section of the act of June 7, 1879, for the privilege of having an office in this State. Such a license fee is not a tax upon either the business or property of corporations, and is not, as such, regulation of commerce within the prohibition of the federal constitution. Through transportation carried on in this State by virtue of contract with connecting railroad companies is not interstate commerce, in the sense in which the commercial clause of the federal constitution is to be interpreted, when its immunity is invoked by a body or persons so engaged. *Norfolk, etc. Co. v. Commonwealth*, S. C. Penn., Oct. 4, 1886; 6 Atl. Rep. 45.

8. CONTRACT—*Voidable—Incapacity—Intoxication—Voluntary—Public Sale—Real Estate—Bid.*—A contract made by a person so destitute of reason as not to know the consequences of his contract, though his incompetency be produced by intoxication, is voidable, and may be avoided by himself though the intoxication was voluntary, and not procured by the circumvention of the other party. A made a bid at a public sale of a piece of real estate, and shortly thereafter signed a contract, and paid earnest money on account. It was proved that, at the time the contract was signed, he was so intoxicated that he did not know what he was doing. He afterwards brought suit to recover his earnest money. *Held*, that his intoxication made the contract voidable, and that he was entitled to recover. *Bush v. Breinig*, S. C. Penn., Oct. 4. 1886; 6 Atl. Rep. 86.

9. CORPORATIONS.—*Municipal Corporations—Contracts—Ultra Vires—City Charters—Power of Common Council to Supply Water.*—A city charter gave its common council power to provide by ordinance "for a supply of water for said city." A contract was made by virtue of an ordinance passed for the purpose. *Held*, to be enforceable, and not *ultra vires*. A provision in a city's charter that "money shall be raised, from year to year, for defraying the supplying the said city with water," does not prevent a contract being made for a term of years. When the legislature confers upon a common council, in an unqualified form, the power to provide the city with a supply of water, the court has no competency to circumscribe such a grant. *Atlantic City Water Works v. Atlantic City*, S. C. N. J., Oct. 20, 1886; 6 Atl. Rep. 24.

10. ——— ———. *Defective Sidewalks — Notice — Negligence — Question for Jury — Contributory Negligence — Defective Sidewalk Constructed by Owner.* — Before a city or other municipal corporation will be liable for injuries caused by a defective sidewalk, it must be shown that the city by its officers had notice of the defect, or that such defect had existed so long and under such circumstances as to raise the presumption of knowledge. But where a portion of the sidewalk is in bad condition by reason of loose boards and defective construction, it is not necessary that the city or its officers should have notice that the particular board which caused the injury was loose. Notice of the general bad condition of the walk at that place will be held sufficient. In an action for damages resulting from personal injuries caused by the alleged negligence of the defendant, the question of contributory negligence on the part of the plaintiff is, ordinarily, one of fact for the jury to determine, under proper instructions from the court. Where a sidewalk is constructed on a public street or thoroughfare in a city by an abutting property owner, without any direction or order by the officers of such city, the fact of such construction by the property owner without authority would not relieve the city from liability for damage to persons injured thereon without fault, if after the construction of such walk the city assumed jurisdiction over it, and ordered repairs to be made prior to the accident. Nor would the city be released from liability, even though it did not assume jurisdiction, if the walk was in a public street in constant use, and in the line of other sidewalks, constructed by direction of the city, or over which it had control. *City of Plattsmouth v. Mitchell*, S. C. Neb. Oct. 6, 1886; 29 N. W. Rep. 593.

11. CRIMINAL LAW—*Homicide—Murder—Indictment—Evidence—Hearsay—Exclamations of Bystanders — Deposition — Proceedings to Take — Commissions.*—An indictment for murder which fails to allege that the act of killing was feloniously committed, is fatally defective. The exclamations of by-standers on the spot where a murder has been committed, giving expression to the opinion that the appellant ought to be hung, are clearly hearsay, and not admissable in evidence. There is no inherent power in a common-law court to issue commissions to take depositions to be read in behalf of litigants in a civil or criminal case; the right to take and use depositions of witnesses in behalf of the defendant in a criminal case is statutory, and does not exist in cases not provided for by the legislature. *Kaelin v. Commonwealth*, Ky. Ct. Appls., Oct. 19, 1886; 1. S. W. Rep. 594.

12. DEED—*Construction—Conditions—Statute of Limitations—Equitable Lien—Courts—Probate Court—Jurisdiction.*—One who accepts a deed accedes to all its terms, and he cannot hold to the beneficial, and repudiate the burdensome, part of the conveyance. The seven-years' statute, which bars the recovery of possession of real estate, has no application to a recovery upon an equitable lien. The probate court has no jurisdiction to declare a lien upon land, or to render a personal judgment for the recovery of money. *Dismukes v. Halpern*, S. C. Ark., Oct. 2, 1886; 1. S. W. Rep. 554.

13 EASEMENT—*Sewer Through Adjoining Premises—Construction of Deeds—Tenants in Common—Estoppel — Contract — To Grant Easement—Acceptance of Deeds—Waiver of Breach.*—Where A, having contracted to convey to C a house adjoining land owned by himself and B, and the use of a sewer running from the house "through his other land adjoining," gave a deed merely referring to the sewer by reserving to himself "the right to connect sewer-pipes with a sewer," and afterwards A and B conveyed the adjoining land to D, "together with the right to connect sewer-pipes with the sewer," and "subject to such rights, if any, as said C has to maintain a sewer across said premises," *held*, that as against D and his grantees, C had no easement to maintain a sewer across the premises adjoining his house; for, if the deed of A purported to convey such an easement, yet B was not a party to it, and if he could be held bound on the theory of ratification or estoppel, such estoppel would not extend to his grantees. Where A agreed to convey to C a house, and the use of a sewer "through his other land adjoining," and in performance of that agreement gave a deed only referring to the sewer by reserving to himself "the right to connect sewer-pipes with the sewer," and, being in fact only tenant in common of said adjoining land with B, afterwards joined with him in a deed thereof to D, so that C acquired no permanent right to maintain the sewer, *held*, that there was a breach of A's contract with C, and that the acceptance of the deed by C did not preclude him from maintaining an action for such breach. *Butterfield v. McNamara*, S. C. Conn., June 18, 1886; 6 Atl. Rep. 188.

14. EMINENT DOMAIN — *Railroad — Statute—Nuisance.*—The statutory sanction which will justify an injury to private property must be express or must be given by clear and unquestionable implication from the powers expressly conferred, so that it can fairly be said that the legislature contemplated the doing of the very act which occasioned the injury. If a railroad company has the right, under an act of the legislature, to acquire land by purchase (for the accommodation of its business), it must secure such a location as will enable it to conduct its operations without violating the just rights of others. Assuming that the general power given by the Laws of 1848, chap. 143, § 6, to the New York & New Haven R. R. Co. to run its trains into New York City over the New York & Harlem Railroad includes, as incidental thereto, the power to purchase land for an engine house, it does not sanction the maintenance of a nuisance, injurious to private property, resulting from the building and use of an engine house. *Cogswell v. New York, etc.* Co., N. Y. Ct. Appl. Oct 5. 1886; 4 Cent. Reps. 225.

15. EXECUTORS AND ADMINISTRATORS—*Suit of Bond — Jurisdiction—Parties—Courts—Jurisdiction of Texas District Court—Probate Orders.*—A suit to recover from the sureties on the bond of an administrator may be brought in the district court, when the amount involved amounts to $500, exclusive of interest, and, if the administrator is dead, and an administrator *de bonis non* has been appointed, he is plaintiff in the suit; but in case there is no such appointment, and there are no debts

the heirs or other distributes of the estate may institute the action. While the Texas constitution deprives the district court of power to revise the orders of the county court by an original proceeding, it does not thereby prohibit an exercise of its acknowledged jurisdiction, because the probate orders of the county court may be a necessary part of the pleadings and evidence in a cause. *Fort v. Fittes*, S. C. Texas, Oct, 19, 1886; 1 S. W. Rep. 563.

16. FRAUD—*Fradulent Representation to Secure Wife's Signature to a Mortgage of Homestead.*—The fact that a wife signed a mortgage of the homestead on misrepresentations to her by her husband as to the claim it was given to secure, but nothing was done to prevent her from reading it, or to mislead her in regard to its contents, does not affect the mortgage in the hands of the payee of the note secured by it, if he was innocent of the fraud. *Miller v. Wolbert*, S. C. Iowa, Oct. 19, 1886; 29 N. W. Rep. 620.

17. HUSBAND AND WIFE—*Separate Estate—Action—Averments—Assumpsit—Affidavit of Defense—Book-Account—Commissions—Error—Feme Covert.* An allegation that the debt contracted for any act done for a married woman was at her instance and request is not sufficient; it must be averred, in some suitable language, that the act done was a necessity. A copy of a book-account charging commissions for the sale of a house, and items of money paid, is not within the affidavit of defense law. The statute limiting time within which a writ of error may be sued out does not apply to a *feme covert*. *Fenn v. Early*, S. C. Penn., Oct. 4, 1886; 6 Atl. Rep. 58.

18. INJUNCTION—*To Restrain an Action for Trespass—Lis Pendens—Specific Performance of Contract.*—A husband, as agent of his wife, sold certain land, the purchaser taking possession, and a portion of the purchase money being given, the balance to be paid on a stated day, and a deed to be executed therefor. Shortly before said day the wife denied this agency, repudiated the sale, and about the time of the commencement of an action for the specific performance of the contract, and the filling of the *lis pendens*, made a deed to another person. Soon after, instigated by the second purchaser, one of the defendants entered the barn on this land, and had the first purchaser arrested for trespass, who tendered his purchase money, and demanded a conveyance. An injunction was sustained restraining the defendants from taking possession, and from prosecuting the trespass suits during the pendency of the other action. *Hadfield v. Skelton*, S. C. Wis., Oct., 12, 1886; 29 N. W. Rep. 639.

19. INSURANCE—*Fire Insurance—Action—Evidence—Value of Goods Destroyed—Trial—Complaint—Answer—Instruction—Action—Value of Property—Evidence—Policy—Waiver—Breach of Conditions—Knowledge of Agents—Appeal—Effect of Evidence.*—In an action against a fire insurance company, the admission of the statements in evidence of a soliciting agent, proved to be an officer and stockholder of the company, if error at all, is error without prejudice. In an action against a fire insurance company, a witness may testify as to the value of goods destroyed, designated by certain terms, if he is familiar with the designation, without the objection of his being called on to construe the policy, or to determine what goods are covered by the description. Where a defense is pleaded in answer to a complaint, and the issue thereon is fairly and fully presented in an instruction, it is as well presented in that connection as though it had been found in the statement of the pleadings and issues preceding the instructions. If, in an action on a fire insurance policy, there is no controversy at the trial as to the value of the property, and the plaintiff testifies that she paid a certain sum for it, and its value is stated at that sum in the application for insurance, in the absence of any evidence or claims to the contrary, the jury may find its value in that sum. Where, in an action against a fire insurance company, the company pleads the existence of a mortgage, and the plaintiff replies that when the insurance was effected she fully explained it, and further replies that any breaches of the condition of the policy which may have occurred were waived by the act of the assistant secretary of the company in requiring and taking proof of loss, which he pronounces sufficient, at the same time informing plaintiff that the loss would be paid, she is entitled to recover in the action. In an action against a fire insurance company, the court need not instruct the jury as to agent's authority to do certain acts on which a claim of waiver is based, where the reply of plaintiff pleads a waiver, which is not denied. The forfeiture of a policy of insurance on account of a breach of its conditions may be waived, and when the waiver is made, it will have the same binding force it originally possessed; following *Vide v. Germania Ins. Co.*, 26 Iowa, 9. In an action against a fire insurance company, knowledge of facts possessed by an agent is chargeable to the company. The verdict of a jury will not be disturbed because the evidence may be meager, or does not satisfy the mind of the court. *Siltz v. Hawkeye Ins Co.*, S. C. Iowa, Oct. 19, 1886; 29 N. W. Rep. 605.

20. ——— ——— *Waiver — Limitation—Subsequent Agreement—"Vacant and Unoccupied"—Increase of Risk—Forfeiture—Question for Jury—Vacancy Unknown to Assured.*—In an action on a policy of insurance begun in the United States Circuit Court within the time limited in the policy for bringing suit, an agreement by the parties to enter an action in this court and prosecute it here, after the time limited in the policy has expired, is a waiver by the defendant of that limitation. A stipulation in a contract of fire insurance that the policy shall be void "if the building shall be occupied or used so as to increase the risk, or become vacant and unoccupied for a period of more than ten days, or the risk be increased by any means whatever," includes such a desertion of the premises and removal from them as would materially increase the risk; and the words "vacant and unoccupied," are equivalent in meaning. When the natural interpretation of the undisputed facts show that the insured building was "vacant and unoccupied," within the meaning of those terms as used in the policy, and there is no evidence to rebut or modify that conclusion, it is error to submit the question to the jury. If an insured building becomes "vacant and unoccupied," under the terms of the contract of insurance, by the removal of a tenant from it, without the knowledge of the assured, the increased risk is still "within the control of the assured," and his ignorance of the vacancy is no

excuse. *Moore v. Phœnix, etc. Co.*, S. C. N. H., July 30, 1886; 6 Atl. Rep. 27.

21. ——— *Life Insurance—Insurable Interest—Support—Amount—Balance — Estate of Insured — Public Policy—Speculation—Motive.*—Where one contracted to support another for life in consideration of a policy of insurance on the life of the latter for the benefit of the former, the party who furnished support had an insurable interest, like an ordinary creditor, for the just amount of his claim for support, the balance belonging to the estate of the insured. The rule of law respecting insurable interest being founded on considerations of public policy, it was error in the court to charge the jury that the question raised in the above state of facts was entirely one of fact, namely, whether it was a specnlation on the life of the insured, or a *bona fide* tranaaction upon benevolent motives. *Siegrist v. Schmoltz*, S. C. Penn., Oct. 4, 1886; 6 Atl. Rep. 49.

22. LAND—*Public Lands—Title to—Presumption—Estoppel—Vendor and Purchaser—Exception to the Rule—Public Policy—Const. Ark. 1868—Act of Congress, May 20, 1862.*—The United States government is the original source of title to lands in Arkansas, and the presumption of law is that the title remains with the government until some other disposition of it is shown; and where a man sells land in that State, claiming to have derived it from the State upon a swamp-land grant, and at the same time, according to the books of the United States land-office, the land was vacant and subject to homestead entry under the federal laws, the presumption is that the grantor had no title, and a note given for the purchase money is void. The general rule that a purchaser of land entering into possession under his contract of purchase cannot, in an action to foreclose a vendor's lien, so long as he retains possession, deny his vendor's title, does not apply to proceedings to collect a note given for the purchase money of land bought from the plaintiff and subsequently entered as a homestead by a resident of Arkansas under the federal laws; such a contract being against the policy of the State constitution of 1868, and the act of congress of May 20. 1862. *Sherman v. Eakin*, S. C. Ark., Oct. 9, 1886; 1 S. W. Rep., 559.

23. LANDORD AND TENANT—*Tenancy at Will—Notice to Quit—Ways—Ascertaining Road by Reference to Plat—Evidence.*—Where the defendant sold a house to the plaintiff, and reserved the possession and use thereof four months, as part of the consideration of the sale, but continued to occupy it after the expiration of that time without any special arrangement, the consent of the plaintiff to such occupation was implied, and the defendant became a tenant at will, entitled to three months' notice to quit, in the absence of an agreement to pay rent at shorter intervals, before action could be brought for possession. Where, on account of the washing away of the shore of a lake, a house had been twice moved back, and a controversy arose as to the ownership of the land on which it stood, which had been described with reference to a certain lake road, the location of which was in question, it was *held* that the plat, as filed with the register of deeds, should govern in determining where said road should be, unless the jury were satified that it was actually laid out at a different point from that marked on the plat. *Hoffman v. Clark*, S. C. Mich., Oct. 14, 1886.

24. MORTGAGE—*Deed by Son-in-Law and Wife, Absolute on Its Face, to Father-in-Law—Evidence—Sufficiency of — Intention—Foreclosure—Consideration—Interest—Witness—Facts Equally within the Knowledge of Deceased—Declarations of Deceased Grantee.*—Where a son-in-law is indebted to a father-in-law, and executes to the latter, in his life-time, a deed of conveyance for certain property, in which the wife of the son-in-law unites, such conveyance, though absolute on its face, may be proved to be a mortgage, and his executors may file a bill in equity for a foreclosure of the same, and apply the proceeds to the payment of the debt. Evidence in this case examined, and *held* sufficient to show that the instrument was intended to operate as a mortgage. In a suit in equity to foreclose a mortgage, it is not necessary to show that any particular time was agreed upon when the mortgage was to be paid, nor to show what interest it was agreed the mortgagor should pay. In the trial of a suit in equity to foreclose a mortgage executed by a husband and wife to a mortgagee or grantee who has died, evidence of husband and wife, so far as it relates to facts equally within the knowledge of the deceased grantee when living, is not admissible under How. St., § 7545. Where a suit is brought by the executors of a grantee or mortgagee, to have a deed which is absolute on its face declared a mortgage, and to foreclose the same for the payment of the mortgage debt, the declarations of the grantee or mortgagee, made after the deed was made, of his intention to hold the property under the deed, or any facts tending to show after-intention, are only admissible in evidence, so far as they tend to prove the original intention at the time the instrument was made. *McMillan v. Bissell*, S. C. Mich., Oct. 11, 1886; 29 N. W. Rep. 737.

25. ——— *Prior Incumbrance — Indexing Record—Constructive Notice—Notice of Prior Incumbrance—Vendor and Vendee — Rescission of Sale of Land—Vendor Taking Timber Claim in Payment—Tender—Jurisdiction—Sale of Land.*—Where, at the time of recording a mortgage upon land, there was an agreement on record creating and reserving to the mortgagor's grantor, the former owner, a contingent interest in the land, and the mortgagor's name was indexed as grantor, and that of the former owner as grantee, *held*, that the record imputed constructive notice to the mortgagee of the existence of the agreement. Where a deed drawn January 5th was not fully executed till January 15th, and agreement reserving and creating in the grantor a contingent interest in the land referred to the deed as made on the 5th of January, both the deed and agreement having been recorded, *held* that, as there was but one deed from the grantor to the grantee on record, the agreement and deed appeared to be connected, and a subsequent mortgagee could not be heard to say that he had no notice of the agreement. In rescinding a sale of land, part of the consideration of which was a timber claim which proved to be not as represented, the vendor made the following tender: "I hereby tender back all the interest which I received from you in said timber claim." *Held*, that the tender was sufficient, and it it was not necessary to tender a deed of the

land covered by claim, no title ever having passed from the United States. Part of the consideration on the sale of certain land was a timber claim assigned by the purchaser to the vendor. At the same time there was a written agreement between the parties that if the purchaser's representations to improvements, etc., upon said claim should prove untrue, that the trade might be rescinded, and vendor's deed canceled. The representations proved untrue, and the vendor began an action in equity to cancel the deed, and to quiet his title. *Held*, that the action was not a claim of forfeiture for breach of condition subsequent, but a claim of right of rescission, under an agreement, for a cause existing at the time of sale, and that equity had jurisdiction. *Paige v. Lindsey*, S. C. Iowa, Oct. 20, 1886; 29 N. W. Rep. 615.

26. NEGLIGENCE—*Obstructing the Sidewalk--Injury to Pedestrian—Court and Jury—Contributory Negligence — Crossing Skid — Presumption.*—Whether an obstruction to travel, along a street or sidewalk, as by placing a skid across the sidewalk to load merchandise from a store into a wagon, is reasonably necessary, is usually a question of fact for the jury; and where plaintiff seeks to recover for injuries received in attempting to cross such a skid, the merchandise to be loaded being alleged to to have been packed "in kegs of the capacity of about five gallons each," and "each package weighing less than fifty pounds," it cannot be held, as matter of law, that such use of the sidewalk was reasonable, and that, therefore, no cause of action is stated. In an action to recover for injuries received by plaintiff in crossing a skid placed across the sidewalk by defendants, the fact that plaintiff attempted to cross the skid does not raise a presumption of contributory negligence on his part. *Jochem v. Robinson*, S. C. Wis., Oct. 12, 1886; 29 N. W. Rep. 640.

27. —— *Railroad Crossing--Negative Testimony—Court and Jury—Looking and Listening for Train—Presumption—Flagman at Crossing —Evidence.*—Where in an action against a railroad company to recover for the death of plaintiff's intestate, who was run over by a train of freight cars, which were backing over a street crossing after dark, it was claimed by defendant, and testified to by its witnesses, that the bell was rung from the front of the train, and switchman with a light guarded the crossing; but several witnesses testified for plaintiff that they saw the train cross the street, but did not see a light displayed on the crossing, or near the end of the train, although they could have seen it if there had been one, and other witnesses, although several hundred feet away, testified that they did not hear a bell rung; and the testimony of the train hands was lacking in precision as to just where the switchman was with the light when the train crossed the street, and was confused and contradictory as to the management of the train; and other evidence tended to support plaintiff's theory: *held*, that a verdict for defendant should not have been ordered by the trial judge. Although plaintiff's intestate, who was killed at a railroad crossing, must have known of the crossing, yet it cannot be conclusively presumed, from the fact of the accident, that she failed to look and listen as she should have done before attempting to cross, and so was guilty of contributory negligence. Although there is no statute or ordinance upon the subject, the absence of a flagman at a railroad crossing may be shown in evidence, in an action to recover for an injury received at the crossing after dark, to be considered by the jury, in connection with all the circumstances of the case, upon the question of defendant's prudence or negligence in running a train at the time and place in question. *Hoye v. Chicago, etc.* Co., S. C. Wis., Oct. 12, 1886; 29 N. W. Rep. 646.

28. PLEDGE AND COLLATERAL SECURITY—*Note—Judgments — Mortgage—Foreclosure — Satisfaction of Debt.*—K takes an assignment of a mortgage, paying therefor the principal sum for which the mortgage was given. He also pays off two judgments against the land covered by the mortgage; taking, as collateral security for the payment of the judgments, interest, and costs on the mortgage, a note given by E B, W B, and J S. J S died after K had recovered a judgment on the note. L the administrator of J S, by order of court, proceeded to sell the real estate; B, the complainant, purchasing. K realized from the land he held the mortgage against within $450 of the full amount due him on mortgage and judgment. This $450 was tendered him by L but K refused it, and issued execution against the lands bought by the complainant, and claims the full amount of the judgment; he holding that the agreement under which he accepted the collateral security being "security to a certain amount, not for a certain amount." *Held*, that upon payment of the $450, the claim of K is satisfied, and that not even a technical use of the words "to" and "for" will bear the defendant's construction. *Burd v. Keyser*, Ct. of Chancery N. J., Oct. 13, 1886; 6 Atl. Rep. 18.

29. SALE—*Action for Price of a Horse-Power—Rescission for Breach of Warranty to be Made in Reasonable Time — Trial — Effect of Accepting Judgment—One Note Where Suit is Brought on Two—Waiver of Appeal.*—In an action for the price of a horse-power and separator, which were sold with the warranty that the machine was well made, of good material, and was of as light draught as any other machine in the market, the warranty to be in force for a year, the defendant cannot set up the defense of a breach of warranty where he had failed to notify the seller of a defect within the warranty, and to return the machine within a reasonable time after the discovery of it. A plaintiff who has brought suit on two promissory notes does not, when the defendant admits a liability on one, but pleads a defense against the other, by accepting the amount which is admitted to be due, waive his appeal from a judgment which is adverse to him on the other note. *Upton, etc. Co. v. Huiske*, S. C. Iowa, Oct. 15, 1886; 29 N. W. Rep. 631.

30. —— *Bill of Sale—Executory and Executed Contract — Consideration — Appeal — From Justice's Court—Jurisdiction of Supreme Court.*—Where, by a written contract, one party sold for a certain sum a crop of cotton and agreed to deliver it at a stated place as fast as gathered, the contract was held executory as regards the delivery, but executed as to the sale of the cotton; and though the consideration named in the bill of sale was a part of a sum owed by the vendor to the purchas-

ers, which it was agreed should thus be satisfied, the title of the latter was not affected by their failure to enter a credit therefor on their books. Objections cannot be heard in the supreme court for the first time to irregularities which may have occurred in perfecting an appeal from a justice's court to the district court. *Brewer v. Blanton*, S. C. Tex., Oct. 19, 1886; 1 S. W. Rep. 572.

31. ——— *Rescission — Fraud — Replevin — Assumpsit—Estoppel—Purchase from Fraudulent Vendee — Consideration — Antecedent Debt.* — On the rescission of a contract of sale on account of the vendee's fraud, the vendor is not precluded from maintaining an action of replevin against purchasers from the vendee, by his subsequently bringing an action of *assumpsit* against the vendor for the price of part of the goods not replevied, and taking judgment by default therein. A purchaser from a fraudulent vendee cannot retain the goods against the vendor, who rescinds the sale, when the only consideration for his purchase was the payment of an antecedent debt due from the vendee to him. *Sleeper v. Davis*, S. C. N. H., July 30, 1886; 6 Atl. Rep. 201.

32. ——— *Warranty — Breach — Promissory Notes.* —The plaintiff brought suit on two promissory notes, which with $100 had been given for a self-binding harvester. The defendant alleged damages for a breach of the warranty, by the terms of which, if the machine was defective, the agent agreed upon prompt notice to repair it, or else to take it back and refund the purchase money and notes. The machine proved defective, after being twice repaired, and the plaintiff then refused either to repair it again or to return the $100 and notes. Judgment for the defendant was affirmed, prompt notice of the failure of the machine having been given by him, and the defendant not having been charged with its acceptance because he kept it beyond the time defined in the warranty, for the purpose of giving it a new and fair trial after it was repaired. The notes were canceled by the effect of the judgment, notwithstanding there was appended to them a waiver of "all defenses." *Osborne v. McQueen*, S. C. Wis., Oct. 12, 1886; 29 N. W. Rep. 636.

33. TELEGRAPH COMPANIES—*Stipulation in Message—Statutory Penalty.*—A condition in a message, which stipulates that all "claims" for damages must be presented within sixty days after sending the message, does not include the statutory penalty allowed for negligent delivery of the telegram. *Western, etc. Co. v. Cobbs*, S. C. Ark., Oct. 9, 1886; 1. S. W. Rep. 558.

34. TRADE-MARK—*"Patent Roofing"—Good-Will —Estate of Decedent.*—Where one carried on the so-called business of "patent roofing" in connection with a worthless patent during his life-time, one of his administrators who continues it under that name after his death, for his own benefit, should not be held liable to the estate as for the use of a trade-mark or good-will belonging thereto, when there is no evidence that the intestate adopted the expression "patent roofing" as a trade-mark, or with any other intention than as a mere designation of the kind of business he was engaged in, or that the business has any special value; particularly when the administrators all jointly carried on the business for a time when they should have sold it out if it was of any great value, and plaintiffs (defendant's co-administrators) then sold to him the machine and office furniture for a small sum, and rented him the office. *Fay v. Fay*, Ct. of Chancery, New Jersey, Oct. 13, 1886; 6 Atl. Rep. 12.

35. WATER AND WATER-COURSES — *Diversion — Deed — Right of Way — Damages — Railroad Company — Fences — Cattle-Guards — Common Law — Right of Way — Damages—Owner—Deed—Waiver.*—Where the diversion of a water-course is expressly authorized by the terms of a deed from the grantor of a right of way to a railroad company, the company is not liable for the consequential damages resulting therefrom. There is no principal of the common law which obliges a railroad corporation to fence its track, or to provide cattle-guards, where the line traverses improved land. In estimating the owner's compensation for a right of way in an action against a railroad company, the additional fencing rendered necessary by the building of the road is an element of the same; but when the owner conveys the right of way by agreement, he waives, in advance, all such damages, it being presumed that these are included in the purchase price of the land. *St. Louis, etc. Co. v. Walbrink*, S. C. Ark., Oct. 2, 1886; 1 S. W. Rep. 545.

36. ——— *Mill — Easement — Deed.* — Land, conveyed by a deed from one who had acquired the same under foreclosure, was described therein as bounded on one side by a certain creek; the bank of the stream along the deeded premises was high and precipitous; the water rights in the stream had for a long time been used by the owners of a mill property on the stream just below the deeded property, and no attempt to use the water power had ever been made by the occupants of the deeded property until a short time before the execution of the deed, when it became available to them through the destruction of the mill dam below. *Held* (*a*), that, in view of the location and physical condition of the deeded property, title was acquired only to a strip of land along the stream, with no rights in the lands under water, or in the water power; (*b*), that the owners of the mill property below should not be restrained from rebuilding their dam. *Hall v. Whitehall, etc. Co.*, N. Y. Ct. App., Oct. 5, 1886; 4 Cent. Rep. 222.

37. WILL—*Construction—Life Interest or Absolute Interest—Precatory Trust.*—Testator by his will, after giving certain real and personal property to his wife, gave to his brother T M in trust for his sisters M C, C M, and H M, 4000*l.* of his East India five per cent. railway shares, and his Scinde and Delhi Railway shares, "on condition that they will support M M. At the demise of either or any of the above, the survivor or survivors to receive the increased income produced thereby. They are hereby enjoined to take care of my nephew J T N C as may seem best in the future." *Held* (1), that a trust was created in favor of the three sisters of the capital of the funds absolutely as joint tenants, subject to the condition of their supporting M M; (2), that no precatory or other trust was created in favor of the nephew J T N C. *Re-Moore; Moore v. Roche*, Eng. Ct. App., 1886; 54 Law Times Rep., 231.

QUERIES AND ANSWERS.

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERIES.

31. If the jury believe from the evidence that Mrs. ——, for the purpose of influencing said testator in making his will, raised prejudices in his mind against those who would otherwise have been the natural objects of his bounty, and by contrivance kept him from intercourse with such persons to the end, that those prejudices or impressions which she knew he had thus formed to the disadvantage of such persons (if the jury so believe) might be removed, then the jury are entitled to consider these facts in connection with other facts in the case, in deciding the issue relative to undue influence. But such facts would not of themselves amount to such proof as the law requires of undue influence sufficient to invalidate the will.

The above instruction was given to the jury in a will case, and was objected to by the contestants. The verdict sustained the will. The Mrs. —— was distantly related to testator, and testimony proved the testator to be blind, over 80 years of age and confined to his bed-room at time of making will, by which, relatives more nearly related than the Mrs. ——, were excluded. Is the instruction correct? Cite authorities. J.

QUERIES ANSWERED.

Query 27. [23 Cent. L. J. 408.]—A contracts to build a house for B, and in the contract there is a clause that A "will deliver the building free of mechanics' or other liens." What effect would such a clause have on material men, sub-contractors and day laborers? If B paid A in full, according to contract, and it turns out that A has not paid for all the material, and still owes sub-contractors and day laborers, could they, under above claim, file a lien on said building?

Answer.—The party inquiring does not state where, and under what law the question is to be answered. Under the Iowa law, it is clear that they would not be entitled to a lien. As the case of Steward & Hayden v. Wright *et al.*, 62 Iowa, 335, holds that sub-contractors who furnish labor or materials for the erection of a building, are required to take notice of the terms of the principal contract, and the owner is protected in making payments to the principal contractor in accordance with the terms of his contract, unless notified of claims for material or labor furnished before such payments are due. And 54 Iowa, 338, *contra* in Nebraska. J. R. C.

RECENT PUBLICATIONS.

CRIMINAL BRIEFS.—By Wm. Henry Malone, of Asheville, North Carolina, author of "Real Property Trials." Baltimore: M. Curlander, Law Bookseller, Publisher and Importer. 1886.

This is a work on criminal law and procedure, which we regard as well worthy of commendation. The author says, that the object of his book is "to state concisely, and at the same time clearly and accurately, all principles of law generally arising in criminal cases," and concludes his preface by saying: "It is hoped that such a condensed presentation of the law, applicable to those questions with which the emergencies of the profession are most likely to confront the practitioner, will be of service in the administration of justice."

From this statement, it is manifest that Mr. Malone has not attempted the impossible task of condensing into the compass of a single volume of less than five hundred pages the great body of the criminal law; but has made a judicious selection of those questions which are most likely to "confront the practitioner," and has treated them as concisely as possible with due regard to their importance.

Mr. Malone's divisions of his subject are good. He pretermits all criminal process prior to the action of the grand jury, and after treating the jury system, generally and briefly, in a preliminary chapter, or "brief," as for some occult reason he calls his subdivisions, he enters upon the subject of his work with the procedure of the grand jury, indictment, presentment and information. The next four briefs treat respectively of "trial and its incidents," "evidence in criminal cases," "insanity as an excuse for crime," and "rules for the interpretation of criminal statutes." As these subjects are disposed of in one hundred and sixty-six pages, it is manifest that no degree of condensation could render the treatment exhaustive; nor, indeed, as we have already said, does it profess to be, but there are many important principles well and succinctly stated within those narrow limits. Following these six briefs are fourteen others, treating specifically a large number of offenses, and to these succeed three briefs, on verdicts and subsequent proceedings, the work concluding with two briefs on extradition and habeas corpus respectively.

The briefs are sub-divided into sections, indicated by italics, but not numbered, as they should have been. The typographical execution of the book is good, and the work, although not as full as could be desired, will prove very useful to the practitioner.

JETSAM AND FLOTSAM.

THERE has lately died at Helston, in Cornwall, an example of a practitioner in the law whose experience of it for length of time and permanence in one place is probably unparallelled. A legal practice once established, especially in a country town, very often lasts for many generations; but no man ever practiced as a solicitor in one firm for eighty years. The nearest approach to this distinction has been attained by a representative of that well-deserving class, which for want of a better name, is called lawyers' clerks. In the year 1806, the late Mr. Treloar entered the service of a firm of solicitors in Helston, at the age of fifteen, not earlier than most of his class begin, and remained with the same firm until he died last week. Partners came and went, but the clerk continued, managing the estates of the clients of the firm, and acting as their deputy at boards of guardians, highway boards, and elsewhere. So valuable a servant was of course well paid, and Mr. Treloar became a man of substance, besides acquiring posts like that of registrar of marriages and manager of the gas company. He also took a leading part in the religious body to which he belonged; but he remained a lawyer's clerk to the end. Probably it was not worth his while, or he could not afford the time, to become a solicitor. Mr. Treloar has at length fallen a victim to the principle that nature, like the law, objects to perpetuities; but he has left a reputation which does credit to the profession of the law, although he was not a formally authorized practitioner of it.—*London Law Journal.*